Supplement
to

545
United States
Tax Cases

VOL. II

KIXMILLER & BAAR

SUPPLEMENT
TO
545
UNITED STATES TAX CASES

BRIEFS OF
FEDERAL AND STATE CASES ON
INCOME TAXES, EXCESS PROFITS TAXES,
AND INHERITANCE, STAMP
AND MISCELLANEOUS BUSINESS TAXES

RESEARCH, BRIEFS AND COMPILATION BY
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FOREWORD

This book is a supplement to the original work entitled, "545 U. S. Tax Cases," published in 1921. Its principal purpose is to bring that work down to date by the addition of briefs of court cases decided since October 1, 1921. In a few instances older cases, which have been discovered during the past year, have also been included. The Synopsis, Table of Cases, and Index have been revised so that, as published in this volume, they cover all cases in both volumes. A change in editorial policy has resulted in excluding from this supplement briefs of selected rulings of the Treasury Department such as are found in the original volume. In view of the fact that these rulings are completely listed and digested in other publications, it is felt that this work should hereafter confine itself exclusively to the field of compiling and abstracting the decisions of federal and state courts. The paging of this book is a continuation of the paging of the original book, so that in all references to page numbers the two are treated as one volume consecutively paged. This volume has been prepared under the editorial supervision of Paul W. Kurz and Charles O. Parker.

KIXMILLER & BAAR.

October 1, 1922.

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and brief of principal points decided in the

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AND SUPPLEMENT

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SYNOPSIS OF CASES

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To treat the family as a unit in granting only a single personal exemption and to provide no personal exemption for corporations are not unconstitutional discriminations.
Robertson v. Pratt, p. 434.

The salary of a state officer may not be applied against the exemption from Federal income tax which he is allowed with respect to his other income.
United States v. Ritchie. p. 569.

A similar rule is applied in the case of Federal officers where state income tax acts are involved.
Biscoe v. Tax Commissioner, p. 93.

The exemptions allowed by the Act of 1913 apply only to normal tax and cannot be extended to the surtax.
Cohen v. Lowe, Collector, p. 147.

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Wells ads. Alderman, p. 599.

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Where a person dies before a retroactive income tax act was passed, but after the date upon which it was designated to take effect, his executors must make a return of his income at the required time.
Brady v. Anderson, Collector, p. 105.

The income of a decedent, who died before the time for making a return, is taxable. The duty of making the return devolves upon the legal representative of the deceased.
Mandell v. Pierce, p. 328.

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Shaffer v. Howard, p. 444.

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Lawrence v. Wardell, Collector, p. 304.

A state may tax the income of a beneficiary of a trust, residing in the state, although the trust is created and administered in another state.
Maguire v. Trefry, p. 326.

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DeGanay v. Lederer, Collector, p. 175.

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Ehret Magnesia Mfg. Co. v. Lederer, p. 194.
Greenport Basin, etc., Co. v. United States, p. 242.

(2) Profits Tax Fixed by Comparison

Where statutory invested capital is negligible in comparison with the volume of business transacted and seriously disproportionate to invested capital of other taxpayers doing a similar business, assessment by comparison is proper.

A. R. R. 364, p. 665.

Inasmuch as advertising expenses cannot be capitalized, where large sums have been spent in advertising, an abnormal condition affecting invested capital exists and excess profits taxes should be determined by comparison.

A. R. M. 12, p. 676.

Where a corporation has intangible assets (such as good-will, patterns and patents) which are earning income, but under statutory provisions cannot be included in invested capital, it is entitled to assessment by comparison.

A. R. R. 110, p. 638.

Tax should be assessed by comparison where invested capital cannot be actually determined, where the income was derived entirely from royalties on patents, and where the volume of business rests practically upon the individual efforts of the stockholders.

A. R. R. 363, p. 664.

Good-will paid into company at incorporation, but at a nominal value, is ground for assessment of excess profits tax by comparison.

A. R. R. 332, p. 660.

Operation of business with large borrowed capital is a ground for assessment of excess profits tax by comparison.

A. R. R. 327, p. 659.

A partnership engaged in the produce commission business, which enjoyed a "substantial credit" in addition to capital invested by the partners and derived approximately half of its income from buying produce outright and selling same for its own account, was properly assessed by comparison under Section 210 of the Revenue Act of 1917, and was not entitled to consideration under Section 209 of that Act.

A. R. R. 19, p. 623.

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A. R. R. 326, p. 659.

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A. R. R. 327, p. 659.

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A. R. R. 36, p. 626.

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A. R. R. 209, p. 646.

(3) Profits Tax Where Invested Capital Not More Than Nominal

See *infra.* (C) Personal Service Corporations

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A. R. R. 36, p. 626.

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A. R. M. 43, p. 689.

(6) Exempt Corporations

The words ''of a purely local character'' in paragraph 10 of Section 231 of the Revenue Act of 1918 do not merely limit the proviso ''or like organizations'' but apply equally to all of the enumerated companies set out in that paragraph.

Commercial Health & Accident Co. v. Pickering, Collector, p. 863.

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Pacific Bldg. & Loan Ass'n v. Hartson. p. 389.
Herold, Collector, v. Park View Bldg. & Loan Ass'n, p. 259.
Lederer, Collector, v. Stockton, p. 307.
Kemper Military School v. Crutchley, p. 281.
Com'l Travelers Life & Accident Ass'n v. Rodway, Collector, p. 152.
A. R. M. 36, p. 685.

The following cases pass upon the requirements for classification as a building and loan association.

Central Bldg., etc., Co. v. Bowland, p. 132.
Pacific Bldg. & Loan Ass'n v. Hartson, p. 389.
Herold, Collector, v. Park View Bldg. & Loan Ass'n, p. 259.
Com'l Travelers Life & Accident Ass'n v. Rodway, p. 152.
Lilley Building & Loan Association v. Miller, Collector, p. 923.

A corporation is not exempt as a building and loan association because organized under a state statute describing such a company as a corporation for the purpose of raising money to be loaned to its members unless the facts show that the corporation has the attribute of mutuality required under the Acts. The test is whether the business transacted with the general public is strictly incidental to its primary business as a mutual building association.

Lilley Building & Loan Company v. Miller, Collector, p. 923.

A mutual insurance association, not operating under the lodge system and the membership of which is not restricted to any one locality, which insures the lives of its members organized into circles, assessments being made against each member in a particular circle upon the death of one of the members thereof, the assessments being sufficient only to pay losses and expenses, is not exempt from taxation under the Acts of 1916 and 1917.

Bankers' and Planters' Mutual Insurance Ass'n v. Walker, Collector, p. 846.

Income received by trustee for benefit of a corporation organized exclusively for charitable purposes held income of the exempt corporation and, therefore, not taxable.

Lederer, Collector, v. Stockton, p. 307.

A public utility corporation organized under the laws of California is a corporation organized for profit and, therefore, not exempt from taxation.

Union Hollywood Water Co. v. Carter, Collector, p. 514.

An exemption conferred by special act is not irrevocable, but may be repealed by a later general act.

Christ Church v. County of Philadelphia. p. 140.

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Laurentide Co. v. Durey, Collector, p. 302.

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Porto Rico Coal Co., Inc., v. Edwards, Collector, p. 410.

(8) Dissolved Corporations

The dissolution of a corporation before the due date of a return does not relieve it from tax liability.

United States v. General Inspection & Loading Co., p. 540.

After dissolution of a corporation, the assets which were distributed to the stockholders were subject to liability for the income tax imposed by retrospective law upon income received by the corporation prior to its dissolution.

United States v. McHatton, p. 550.

(C) Personal Service Corporations

Under this heading are collected all cases dealing with corporations having no invested capital, or a capital not more than nominal.

Section 209 of the Revenue Act of 1917, relating to corporations having no invested capital, or a capital not more than nominal, is not limited in application to concerns rendering personal service.

De Laski & Throop, etc., Co. v. Iredell, Collector, p. 177.

The tax is assessable against a partnership under Section 209 of the Revenue Act of 1917, as a business having no invested capital or not more than nominal capital, only where money or property plays no part in the source of the income, or so small a part as to be practically negligible. The profits of a business having no capital, even though not withdrawn, must be used in the business to constitute capital. Isolated transactions by the partners, requiring capital, but not conducted as a part of any trade or business, do not prevent assessment under this section.

Porter et al. v. Lederer, Collector, p. 409.

Since patents are not capital in an economic sense, the granting of licenses under a patent would seem to be rendering personal service, and not employing "capital," certainly no more than a "nominal capital."

De Laski & Throop, etc., Co. v. Iredell, Collector, p. 177.

Apparently contra—

Lincoln Chemical Co. v. Edwards, Collector, p. 310.

The De Laski case is not followed by the Bureau of Internal Revenue, which holds that income from patents is derived from the employment of capital.

A. R. R. 363, p. 664.

Where annual receipts were approximately $3,000 and "earned surplus" amounted to $2,000, capital is not "nominal."

Lincoln Chemical Co. v. Edwards, Collector, p. 310.

One is not a broker who buys and sells, and undertakes and assumes all the risks and enjoys all the benefits of a merchandising business.

Cartier et al. v. Doyle, Collector, p. 126; reversed on other points, p. 854.

A corporation engaged not merely in buying and selling on commission but also in trading substantially on its own account, and employing capital in making advances for its principal and also in buying merchandise on its own account, held not to be a business with no invested capital or not more than a nominal capital.

Martin v. Edwards, Collector, p. 932.

Concerns do not lose classification as personal service corporations merely because of size of their capital if the employment of such capital is merely incidental.

A. R. R. 24, p. 624.

Where income was derived both from commissions on sales of produce belonging to others and from profits on sales of produce purchased for its own account, and where the firm also enjoyed a substantial credit, more than a nominal capital was employed in the business.

A. R. R. 19, p. 623.

A corporation dealing largely in services of others, who are not connected with the corporation through stock ownership, but merely as employees, is not a personal service corporation.

A. R. M. 59, p. 692.
A. R. R. 464, p. 671.

A company engaged in the freight forwarding business, with income from sources other than commissions, and customarily advancing the necessary transportation costs for customers, employs more than nominal capital.

A. R. R. 7, p. 619.

Where direct buying and selling of merchandise yields 30% of a firm's income, and the balance sheet shows numerous accounts receivable and payable, assessment under Section 209 of the Revenue Act of 1917 was denied, as more than a nominal capital was employed.

A. R. R. 364, p. 665.

For the distinction between capital employed in banking and in other phases of the business of a trust company, see —

Anderson v. Farmers' Loan & Trust Co., p. 72.
Fidelity and Deposit Co. of Maryland v. United States, p. 887.
Fidelity Title & Trust Co. v. United States, p. 891.
Mayes, Collector, v. United States Trust Co., p. 935.

(D) Trusts and Associations

Trusts were not taxable under the Act of August 5, 1909.

Elliott v. Freeman, p. 198.

A trust cannot be held to be an association taxable as a corporation, where the trustees have discretionary powers, by combining the trustees and the beneficiaries, the latter having other and contrasting functions and powers but not being associated in any way for the control of the trustees.

Crocker et al., Trustees, v. Malley, Collector, p. 161.

The character of a business organization is to be gauged rather by the powers of the certificate holders than by the extent to which those powers have at any time been exercised, and so, where the certificate holders have the absolute powers of termination and amendment of the trust document, the ultimate control of the business being thus vested in them, the organization is an association.

In re Associated Trust, p. 839.

A Massachusetts trust, organized to own and operate real estate, having transferable shares of stock, must be classified as an association where the stockholders are vested with the powers to remove the trustees, terminate the trust, and modify the instrument in any particular, since the seat of real power is thus with the stockholders; and also, because Massachusetts statutes have now given such trusts a statutory basis as quasi-corporate associations.

Malley, formerly Collector v. Howard, et al., Trustees, p. 928.

Agreement held to create a joint stock company or association subject to income tax under Revenue Act of 1913, because control over trustees rested indirectly in beneficiaries.

Chicago Title and Trust Co. v. Smietanka, Collector, p. 136.

An unincorporated association which has a capital stock represented by shares, is managed by a board of directors, and has most of the attributes of a corporation, is taxable as a corporation.

Roberts v. Anderson, p. 432.

Where dividends are not paid to stockholders of a bank but are credited to a "Stockholders' Trustee Account" and invested in deals not countenanced by the Comptroller of Currency, an association taxable as a corporation is created, and is required to join in a consolidated return with the bank.

A. R. M. 43, p. 689.

(E) Estates and Fiduciaries

(1) Estates Taxed as Entities

A trustee is a taxable person under the Revenue Acts of 1916 and 1917.
Merchants Loan and Trust Co. v. Smietanka, p. 345.

Undistributed net income of a trust estate under the control of a resident fiduciary is taxable in the same manner as income accruing to an unmarried resident individual.
A. R. M. 37, p. 685.

Under a state act, income derived from trust property without the state was held not to be taxable to a non-resident trustee who, as well as the beneficiaries, resided without the state, although he rendered his accounts to a court within the state.
Bayfield County v. Pishon, p. 86.

A payment by a corporation to a beneficiary, both of whom resided outside the state was held to be taxable income to the trustee in the state where he resided.
State ex rel. Wisconsin Trust Co. et al. v. Phelps, p. 473.

Under a state act, income received by a trustee was held taxable even though it was payable as an annuity to a designated beneficiary, and inheritance tax had already been collected upon the annuity.
State ex rel. Hickox v. Widule, p. 480.

Under the Hawaiian Act, income received by a trustee from the trust fund, payable to designated persons, was held not to be taxable income of the trustee.
Wilder v. Hawaiian Trust Company, p. 605.

(2) Net Income of an Estate

It is not within the power of a testator to render a fund non-taxable.
Merchants Loan and Trust Co. v. Smietanka, p. 345.

Non-resident alien fiduciaries of trusts subject to the jurisdiction of a foreign country are taxable on undistributed net income from sources within the United States.
A. R. M. 37, p. 685.

Under the Act of October 3, 1913, income held and accumulated by a trustee for the benefit of unborn and unascertained persons is not taxable.
Smietanka, Collector v. First Trust & Savings Bank, Trustee, p. 979; affirming case below, p. 215.

NOTE.—Acts subsequent to the 1913 Act specifically declare that the income accumulated in trust for the benefit of unborn or unascertained persons shall be taxed and assessed to the trustee.

Under the Act of October 3, 1913, an amount received under a will from the income of an estate by a person having no interest in the principal, is not taxable income to the beneficiary.
Gavit v. Irwin, Collector, p. 898.

Attorneys' fees in a suit to establish title to trust property are not an allowable deduction in the return of the fiduciary.
A. R. R. 284, p. 655.

(3) Returns of Fiduciaries

The duty of making return for a person who died before the time for making the return devolves upon the legal representative of the deceased.
Mandell v. Pierce, p. 228.
Brady v. Anderson, Collector, p. 105.

An estate is entitled to personal exemption of $1,000, regardless of the citizenship of the creator of the trust or of the ultimate beneficiaries.
A. R. M. 37, p. 685.

(4) Fiduciaries as Agents

Income received by a receiver appointed to take over and manage the property of a corporation is not taxable under the Act of August 5, 1909.
United States v. Whitridge Receiver, p. 579.
Pennsylvania Steel Co. et al. v. N. Y. C. R. R. et al., p. 399.

Nor under the Revenue Acts of 1913, 1916, 1917.
Equitable Trust Co., of N. Y., v. Pacific Ry. Co. et al., p. 203.
Lathers et al. v. Hamlin, p. 300.
Western Pacific R. R. Co. v. Scott, p. 602.

Income received by a trustee of a bankrupt corporation, which income is not the result of operating the business, is not subject to tax under the Revenue Act of 1916.
In re Heller, Hirsh & Co., p. 255.

The United States has no present provable claim against the receivers of a corporation for income taxes on the corporation's receipt of an amount of money as income prior to the expiration of the calendar year for which such taxes are due and so the receivers were instructed by the court to declare no dividend where the United States asserted a substantial demand for taxes which were not due.
Pennsylvania Cement Co. v. Bradley Contracting Co., p. 954.

A fiduciary who hastened distribution before the due date of a tax and then had nothing with which to pay the same, would be personally responsible.
Pennsylvania Cement Co. v. Bradley Contracting Co., p. 954.

The costs and expenses of administering the estate of a bankrupt are payable from the estate in priority to income taxes due the United States.
In re Jacobson, p. 275.

The state court is not the proper court to determine, upon application of a trustee of property in liquidation, whether taxes are legally due the United States.
In re Application of Willmann et al., Trustees in Liquidation, p. 611.

II. Invested Capital

(A) Definition and Nature

(1) General

Collateral deposited by a partner as security for repayment of a loan to the partnership cannot be held to be "tangible property paid in" to the partnership and, therefore, is not invested capital.
Cartier, et al. v. Doyle, Collector, p. 854; reversing case below, p. 126.

Withdrawals made by partners in excess of sums credited to each but in anticipation of a distribution of profit cannot be treated as invested capital.

Cartier, et al. v. Doyle, Collector, p. 854; reversing case below, p. 126.

(2) Paid-Up Capital Stock

Shares issued as a stock dividend cannot be said to have been paid for in tangible property, treating the old shares as being paid in for the new ones.

LaBelle Iron Works v. United States, p. 294.

An unconditional subscription to capital stock, charged to the account of the president, bearing interest and subsequently converted into a note, should be recognized as invested capital.

A. R. R. 167, p. 644.

As to the extent that subscription agreements with officers and employees may be used in payment of stock, see—

A. R. R. 10, p. 620.
A. R. R. 167, p. 644.

"Paid-up capital stock," as basis for the interest deduction under the Act of August 5, 1909, does not include amounts paid for stock in excess of par value.

N. Y., New Haven & Hartford R. Co. v. United States, p. 365. (Same case below, p. 556.)
Boston & Maine R. R. v. United States, p. 99.

(3) Paid-in Surplus

Paid-in surplus must be some tangible property transferred from the owners to a corporation either as a gift or at a value less than the actual cash value of the property transferred, and in practically all cases where allowable, involves no substantial change in beneficial interest.

A. R. R. 233, p. 652.

Contracts made with the company itself, and to which it is one of the parties, cannot be held to be paid-in surplus.

A. R. R. 233, p. 652.

Where patents are turned over to a company without consideration, their value when turned in may be included in invested capital under the Revenue Act of 1917.

A. R. R. 70, p. 632.

No paid-in surplus is permissible, directly or indirectly, for invested capital purposes, as to intangible assets conveyed.

A. R. R. 307, p. 658.

Patents, since not specifically paid for in cash or by issuance of any stock, held not invested capital.

A. R. R. 9, p. 619.

A claim for addition to invested capital as paid-in surplus may be based upon an appraisal made approximately at the time of the conveyance of the property.

A. R. R. 161, p. 643.

(4) Earned Surplus and Undivided Profits

Earned surplus consists of realized gains or profits reduced by depreciation, but not increased by appreciation.

A. R. R. 71, p. 633.

Undivided profits are to be considered surplus within the meaning of the Act of June 13, 1898, imposing a tax on bankers.

Fidelity Title & Trust Co. v. United States, p. 891.
Leather Mfrs. Nat. Bank v. Treat, Collector, p. 918.

Credits of earnings to accounts of stockholders, where no formal declaration of a dividend has been made by the board of directors, no interest has been or is to be paid upon amounts so credited, and under the State law such credits do not rank with amounts due general creditors, should be regarded as part of earned surplus and included in invested capital.

A. R. M. 71, p. 633.

Where, prior to enactment of the Excess-Profits Tax Act, amounts expended by a company for advertising and developing trademarks, formulae, etc., were capitalized, having previously been charged to expense, it was held such amounts were properly included in the invested capital of the company.

A. R. M. 134, p. 704.

When such expenditures have not been capitalized prior to the enactment of the Excess-Profits Tax Law, they may not later be added to the invested capital.

A. R. M. 12, p. 676.

Cash surrender value of insurance policies carried on the lives of officers or employees may be included in invested capital of a corporation.

A. R. R. 229, p. 649.

Intangible assets conveyed may indirectly be basis of earned surplus.

A. R. R. 307, p. 658.

''Stockholders' Special Trustee Account'' on books of a bank to which dividends are credited should be included in invested capital in a consolidated return for the bank and the trust.

A. R. M. 43, p. 689.

(5) Borrowed Capital

Where a partnership operated on capital secured as a loan from a bank on partnership notes, endorsed by the partners and secured by a deposit of collateral by one of the partners, it was held to have no invested capital, since the Act excluded from invested capital borrowed money.

Cartier, et al. v. Doyle, Collector, p. 854; reversing case below, p. 126.

Where money is paid or left in the business, and if interest is paid or to be paid on such amount, or if the stockholders' or officers' right of repayment of any such amount ranks with or before that of general creditors, it is borrowed capital and must be excluded from invested capital.

A. R. R. 116, p. 639.

Profits allowed to accumulate for a long period and prorated among stockholders at deaths of various stockholders, as they occurred, are borrowed capital and excluded from invested capital even though non-interest bearing.

A. R. R. 102, p. 636.

Amounts paid in by stockholders and credited as ''Special Accounts,'' to which dividends duly declared were also credited, which accounts were covered by interest bearing notes and the principal of which was subrogated to the general creditors, are borrowed capital, and hence excluded from invested capital.

A. R. R. 102, p. 636.

(6) Goodwill and Intangible Property as Capital

Good will, to be included in invested capital under the Revenue Act of 1917, must be paid for specifically in cash or stock by the corporation.

A. R. R. 250, p. 651.
A. R. R. 413, p. 668.

Transactions between stockholders and individuals in sale of stock of corporation cannot create good will for invested capital purposes, no matter at what price the stock sells.

A. R. R. 413, p. 668.

No paid-in surplus for invested capital purposes is permissible directly or indirectly as to intangible assets conveyed.

A. R. R. 307, p. 658.

Upon a corrected allocation of stock to tangibles and intangibles acquired, earned surplus and invested capital were increased by reason of intangible assets conveyed.

A. R. R. 307, p. 658.

Although some proportion of all advertising is in effect good will, it is impossible to allocate any definite percentages as between capital investment and selling costs, and all must be charged as expense.

A. R. M. 12, p. 676.

Neither the cost of patents charged to expense nor their appreciated value may be included in invested capital.

A. R. R. 71, p. 633.

Expiration of patents for which stock was issued would not affect invested capital.

A. R. R. 436, p. 670.

(7) Tangible Assets

Revenue Act of 1917 classifies patents as tangible property.

A. R. R. 70, p. 632.

(8) Appreciation and Depreciation

Unrealized appreciation in value of assets over and above cost cannot be included in invested capital under Revenue Act of 1917.

La Belle Iron Works v. United States, p. 294.

Realization during the taxable year of appreciation in value occurring before March 1, 1913, cannot be included in invested capital of the taxable year.

A. R. M. 51, p. 691.

Neither the cost of patents charged to expense nor their appreciated value may be included in invested capital.

A. R. R. 71, p. 633.

Appreciation cannot offset depreciation in value of assets through wear, tear and exhaustion.

A. R. R. 71, p. 633.

There is no warrant for reducing earned surplus because of an alleged failure to charge off sufficient depreciation in the past, unless the depreciable assets of a corporation are valued on its books at the beginning of the taxable year at an amount in excess of their actual value at that time.

A. R. M. 106, p. 700.

Invested capital originally paid in can be reduced only on one condition, namely, return to stockholders through liquidation; consequently expiration of patents for which stock was issued would not affect invested capital.

A. R. R. 436, p. 670.

(9) Reorganizations

Every corporate entity is a new organization, even though officers, directors, or proportions of stockholdings remain the same as in the old corporation. The only exception is the case of a mere change of domicile, that is surrender of charter in one state and taking out of a new charter in a different state without change in the amount of stock, the identity of the stockholders, or the capital and surplus.

A. R. M. 60, p. 692.

A corporation, similar to its predecessor (a bankrupt corporation) only in that the product manufactured is sold under the same name and is produced in the same location, is substantially a continuation of the predecessor for excess profits tax purposes, in the determination of the prewar credit.

A. R. R. 221, p. 647.

Where, under state law, a corporation ceased to exist when its charter expired, obtaining of a new charter is a reorganization, and determination of invested capital must be as of the date of the new charter.

A. R. R. 268, p. 654.

(10) Determination of Value of Property

Where property is paid into a corporation for stock, the common declaration of the contributor and the corporation as to the value of such property is at least equally as convincing as other declarations of opinion made or procured subsequently when the interest of the parties has shifted.

Castner, Curran & Bullitt, Inc. v. Lederer, Collector, p. 857.

An appraisal for the determination of value as of a certain date must be made in the light only of knowledge or facts ascertainable on that date and not in the light of subsequent happenings.

A. R. R. 358, p. 663.

Appraisal held to come within the above rule.

A. R. R. 161, p. 643.

Appraisal held not to come within above rule.

A. R. R. 358, p. 663.

Plant efficiency method of determining value approved.

A. R. M. 106 Explained, p. 700.

Value of good will should be determined upon basis of approximately a five-year return.

A. R. M. 12, p. 676.

The value of a patent is fixed by the value of stock issued therefor, as determined by purchases and sales of the stock at or about the time of issuance, instead of by an appraisal which established a higher figure.

A. R. R. 436, p. 670.

Where under state law a corporation ceased to exist when its charter expired, and a new charter was obtained prior to March 3, 1917, the assets should be valued as of the date of transfer to the new corporation resulting from the new charter.

A. R. R. 268, p. 654.

Under the Revenue Act of 1917 property is valued for invested capital purposes at cost to original owner only in the event of reorganization, consolidation, or change of ownership of a trade or business after March 3, 1917, where 50% or more of the control remains in the same person, whereas under the Revenue Act of 1918, in addition, property is so valued upon any change of ownership after March 3, 1917, if an interest or control in such property of 50% or more remains in the same persons.

A. R. R. 285, p. 656.

(11) Minimum Invested Capital

Where a taxpayer has an invested capital more than nominal in amount, he is not in a position to complain of regulations promulgated or of method employed in determining the amount of invested capital, when the arbitrary or suppositious invested capital fixed upon was larger in amount than the invested capital actually possessed and employed.

Cartier, et al. v. Doyle, Collector, p. 126; reversed on other points, p. 854.

Where the statutory invested capital which can be established is in excess of the constructive capital found by application of the comparative method of assessment, the taxpayer should not be deprived of his right to have the assessment based upon the statutory invested capital.

A. R. R. 209, p. 646.

(12) Allocation of Capital

In order to determine what portion of the capital is employed in a certain phase of a business, determine what part of the total assets is so employed; the same proportion of the capital surplus and undivided profits must be deemed to be so employed.

Anderson v. Farmers' Loan & Trust Co., p. 72.
Mayes, Collector v. United States Trust Co., p. 935.

III. Determination of Net Income

(A) Nature of Taxable Income

(1) General

The gain derived from an isolated sale of property is included within the terms of the Revenue Act of 1916.

Merchants Loan & Trust Co. v. Smietanka, p. 345.

Income may be taxable even though it practically or theoretically involves a wasting of capital, as by the depletion of natural resources.

Stratton's Independence v. Howbert, p. 493.

The proceeds of a life insurance policy paid to a corporation beneficiary are taxable income of the corporation.

A. R. R. 335, p. 661.

Income from property may be taxed, despite the fact that there is also a tax upon the property itself.

State ex rel. Bolens v. Frear et al., p. 464.
Wilcox v. County Commissioners, p. 604.

The estimated rental value of a residence occupied by the owner may be made income by the legislature.

State ex rel. Bolens v. Frear et al., p. 464.

A law is not unconstitutional because the net income which it taxes does not include commodities produced and consumed by the taxpayer.

Robertson v. Pratt, p. 434.

"Net income" under the Revenue Act of 1917 includes the excess profits tax assessed under said act, despite the fact that the latter tax may be used as a credit in computing the income tax.

People ex rel. Barcalo Mfg. Co. v. Knapp et al., p. 400.

A state may tax a non-resident thereof on income received from property owned by him within the state.

Shaffer v. Carter, p. 448.

But, interest on bonds owned by a non-resident was held not to be taxable under another state act simply because the corporation issuing the bonds was a resident of the state.

Manitowoc Gas Co. v. Tax Commissioner, p. 329.

An inheritance was held taxable, under a state income tax act, to a citizen of that state, though the property inherited was located in another state.

State ex rel. Brenk v. Widule, p. 479.

The profit from a business as a whole is the excess of the aggregate gains from all sources, over the aggregate of losses.

Little Miami, etc., R. R. Co. v. United States, p. 312.

Undistributed surplus, gains or earnings carried to a surplus or contingent fund are taxable under Act of July 13, 1866.

Dollar Savings Bank v. United States, p. 184.

According to the Act of 1866, taxable income was ascertained from the amounts distributed or disposed in the various possible modes.

Railroad v. Collector, p. 419.

The Act of 1864 imposed an income tax on the amount distributed in interest and dividends.

Barnes v. The Railroads, p. 85.

Annuities which had already been subjected to inheritance tax held not to constitute income under the income tax law of a particular state.

State ex rel. Kempsmith v. Widule, p. 482.

Where it is arranged to pay to stockholders and bondholders of a corporation, as dividends or interest, rents or other payments which would otherwise be received by the corporation which furnished the consideration, such payments nevertheless remain income of the corporation.

Rensselaer & S. R. Co. v. Irwin, p. 428.
Northern Railway Co. of New Jersey v. Lowe, Collector, p. 376.

Where property of a corporation is appraised upon its books at a higher value than that at which it had formerly been carried, this increase in valuation is not income, or even gain in any proper sense.

Baldwin Locomotive Works v. McCoach, Collector, p. 83.
United States ads. Alpha Portland Cement Co., p. 521.
Forty Fort Coal Co. v. Kirkendall, Collector, p. 223.

A transfer of stocks for a promissory note, which is collectible, or an exchange thereof for land, followed by a sale of such land within the year for collectible promissory notes, is to be considered a sale of such stock for so much cash.

United States v. Smith, p. 573.

A corporation may be taxed upon the amount of interest paid to non-resident alien bondholders.

Railroad Co. v. Collector, p. 419.

''Future'' contracts which are ''hedges'' against actual ''spot'' or cash transactions may be incorporated in their balance sheets by dealers in cotton, grain, etc., for the purpose of determining taxable income.
A. R. M. 135, p. 704.

(2) Time for Reporting

Unless otherwise expressed in a statute the word ''year'' will always be intended to mean a calendar year; but when applied to revenue, the presumption is in favor of its referring to a fiscal year.
Glasgow v. Rowse, p. 230.

Deferred payments of the selling price of property, not represented by notes or secured in any way, are not income of the year of sale of the property.
United States v. Christine Oil & Gas Co., p. 532.

The mere crediting of dividends on the books of the corporation does not make them income to the stockholders.
Park. v. Gilligan, p. 393.

Under an income tax act of 1870, a promissory note was held not to be income for the year in which it was received.
United States v. Schillinger, p. 572.

The expression ''income received during such year'' looks to the time of realization rather than to the period of accruement.
Fink, Collector, v. Northwestern Mut. Life Ins. Co., p. 210.

Insurance companies must include in gross income premiums collected by agents during the year, even though they are not transmitted to the company until the following year.
Maryland Casualty Co. v. United States, p. 332.

A receiver who, at the end of his receivership, has been awarded compensation in addition to his salary, must return such income for taxation in the year of its determination and payment.
Jackson v. Smietanka, Collector, p. 271.

A credit allowed by a corporation on its books to apply against the overdrafts of an officer is income to him for the year in which the credit was allowed.
Holbrook v. Moore, Collector, p. 261.

Cash is income for the year in which received, despite the fact that it may have been earned in a prior year.
Woods v. Lewellyn, p. 612.
State ex rel. Houghton v. Phelps, County Clerk, p. 474.
Jackson v. Smietanka, Collector, p. 271.

Under an income tax act which did not exempt property acquired by devise, a bequest is income for the year in which received, and not for the year in which the testator died.
Halsted v. Pratt, p. 247.

Where responsibilities and duties of a company under its contracts were not fully discharged until the last installment is received, the full amount of commissions should not be reported as income for the year the contract was entered into, but should be reported as income only when fully earned.
A. R. R. 464, p. 671.

(3) Receipt and Accrual Computation

A statute which taxes ''income received'' contemplates that the return shall be on a cash basis.

Mutual Benefit Life Ins. Co. v. Herold, Collector, p. 355.
Lumber Mutual Fire Insurance Co. v. Malley, Collector, p. 320.

There can be no receipt, constructive or otherwise, when the thing to be received is not yet determined.

A. R. R. 375, p. 666.

A corporation which uses inventories and has accounts receivable must make its returns on the accrual basis.

A. R. R. 217, p. 646.

Banks which are compelled by state or Federal officials to keep their books in a certain manner which does not show the correct net income may keep separate books or records from which they will be able to file correct returns.

A. R. R. 377, p. 667.

(4) Devices to Escape Taxation

A transaction which is carried out in a legal manner is not made ineffectual simply because its motive was to reduce or avoid taxation in the future.

Weeks v. Sibley, p. 597.

Equity will not sanction a plan whereby the stockholders of a corporation go through the form of leasing their property, while retaining it in substance, in order to escape federal taxes.

Allen v. Francisco Sugar Co., p. 67.

Although a device is adopted to avoid the revenue acts and has the effect of avoiding them, yet if carried out by means of legal forms, it is subject to no legal censure.

United States v. Isham, p. 545.

(B) Items Not Included in Gross Income

(1) Compensation of Public Employees

Congress cannot, under the Constitution of the United States, impose a tax upon the income of an officer of a state.

Collector v. Day, p. 149.
United States v. Ritchie, p. 569.
Freedman v. Sigel. Collector, p. 225.

A state cannot impose an income tax upon the salary of a federal officer, received from the United States.

Purnell v. Page, Sheriff, p. 419.

The salary of a federal judge cannot be subjected to federal income tax by a statute passed after he takes office.

Chief Justice Taney to Mr. Chase, p. 138.
Evans v. Gore, p. 203.

A state constitutional provision that powers of judges shall not be diminished during their continuance in office prevents the imposition of a tax upon the official salary of a state judge, and it can make no difference whether the tax be levied before or after the taking of office or that the judge's salary was increased by the same assembly which passed the act imposing the tax.

Long v. Watts, p. 926.

The salaries of state judges cannot be taxed by a state statute passed after they took office.

In re Taxation of Salaries of Judges, p. 499.

But, in another case, the provisions of a state constitution were held to permit the taxation of the salaries of state officers by an act passed after they took office.

State ex rel. Wickham v. Nygaard, p. 472.

Compensation received by railroad officials from the United States while the railroads were under federal control is not subject to a state income tax.

Biscoe v. Tax Commissioner, p. 93.

A state may not tax an officer of the United States revenue-cutter service for his office or its emolument.

Dobbins v. Commissioners, p. 180.

A clerk in a post office is not a federal officer within the meaning of the rule exempting the salaries of such officers from taxation by a state.

Melcher v. City of Boston, p. 342.

Travel pay received by an army officer from the United States is not exempt from federal income tax.

Galin v. United States, p. 228.

(2) Other Items

The right to subscribe to additional shares of stock of a corporation does not in itself constitute taxable income.

Miles, Collector v. The Safe Deposit & Trust Co. of Baltimore, Guardian, p. 941.

Under the Act of October 3, 1913, an amount received under a will from the income of an estate, by a person having no interest in the principal of the estate, is not taxable income to the beneficiary, since under that Act income must be something separate, apart, and distinct from capital, both belonging to the individual sought to be taxed. The right of an heir to receive property or money of a decedent is not capital.

Gavit v. Irwin, Collector, p. 898.

Bequests to executors, in lieu of all compensation or commissions, are not taxable income when received by the executors, since the bequests were payable irrespective of whether or not the services were rendered.

Merriam v. United States, p. 939; reversing case below, p. 577.

The income of a city may not be taxed by the federal government.

United States v. Railroad Company, p. 567.

Alimony received is not taxable income.

Gould v. Gould, p. 237.

Income from tax-exempt railroad property is not taxable.

Oahu R. & L. Co. v. Pratt, p. 380.

(C) Gross Taxable Income

(1) Income From Trade, Business, and Commerce

Contributions to a public utility company by customers, for service connections and pipe extensions, are income.

Union Hollywood Co. v. Carter, Collector, p. 514.

A state statute may impose a tax on income from business transacted within the state, even though such transactions involve interstate commerce, so long as a burden is not placed upon interstate commerce.

United States Glue Co. v. Town of Oak Creek, p. 581.

(2) Income of Insurance Companies

Under the 1909 Act, only premiums actually received in cash during the year need be reported as income by an insurance company.

Lumber Mutual Fire Ins. Co. v. Malley, p. 320.

When reserve funds of an insurance company are released, they constitute income.

Maryland Casualty Co. v. United States, p. 332.

Neither the entire deposits made by members of a mutual insurance company to cover estimated losses, nor the interest on such deposits, are taxable income of the company.

Jewelers Safety Fund Society v. Lowe, Collector, p. 278.

Surplus accumulated by a mutual life insurance company and taxed in one year is not again taxable in the following year when it forms the basis of so-called "dividends."

Fink, Collector, v. Northwestern Mut. Life Ins. Co., p. 210.

So-called "dividends" of a mutual life insurance company, with reference to which the policy holder does not exercise the option of withdrawal in cash, are not income of the company.

Mutual Benefit Life Ins. Co. v. Herold, Collector, p. 355.
Eaton, Collector, v. Connecticut General Life Ins. Co., p. 189.
Prudential Ins. Co. v. Herold, Collector, p. 414.
Herold, Collector, v. Mutual Benefit Life Ins. Co., p. 259.

Under the 1913 Act, "dividends" paid in cash, and not applied by the policyholder to the payment of premiums, may not be excluded from gross income by an insurance company.

Penn Mutual Life Ins. Co. v. Lederer, Collector, p. 397.

(3) Income From Sales of Property

(a) Taxability of Profit

Under a statute taxing "the gains, profits and income for the year" it was held that the mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of a tax upon the amount of the advance.

Gray v. Darlington, p. 240.

Enhancement in value does not of itself constitute taxable income.

Industrial Trust Co. v. Walsh, Collector, p. 268.
Lumber Mutual Fire Insurance Co. v. Malley, p. 319.

Appreciation in value of capital assets, when realized by sale, is income.

Walsh v. Brewster, p. 592.
Goodrich v. Edwards, p. 234.
Scott v. Schwab, p. 446.
Hay, Collector, v. Gauley Mountain Coal Co., p. 254.

Profit on the sale of real estate is taxable for the year in which title or possession passes, and not for the prior year in which the contract of sale was signed and a small part of the purchase price paid down.

A. R. R. 13, p. 621.

The entire amount received from the sale of a stockholder's right to subscribe for new shares is not taxable income, but the sale of the right must be treated as a sale of a portion of the capital interest that included the old shares.

Miles, Collector, v. The Safe Deposit & Trust Co. of Baltimore, Guardian, p. 941; affirming case below, p. 439.

A bona fide exchange of stocks for other property is not a sale thereof from which profits are derived, liable to taxation as income.

United States v. Smith, p. 573.

(b) Determination of Profit

The gain is the difference between cost and selling price; the portion thereof which accrued before March 1, 1913, is not taxable under the federal acts.

Goodrich v. Edwards, p. 234.
Walsh v. Brewster, p. 592.
Darlington v. Mager, p. 165.

Deposits made by members of a mutual insurance company to cover estimated losses, as well as the interest on such deposits, are taxable income of the company.

The principle of valuation as of March 1, 1913, applies only to property, and not to obligations of the taxpayer which are later redeemed at less than par.

A. R. R. 545, p. 675.

Realization of enhancement in value accrued prior to the effective date of the Act is not taxable income.

Bundy v. Nygaard, p. 116.

Under the 1909 Act, only so much of the profit as accrued after December 31, 1908, is taxable income.

United States v. Cleveland C. C. & St. L. Ry. Co., p. 533.
Mitchell Bros. v. Doyle, p. 353.
United States v. Guggenheim Exploration Co., p. 544.
Hay, Collector, v. Gauley Mountain Coal Co., p. 254.

Excess of the sale price over value on January 1, 1909, was, however, held to be taxable income, even though the sale price was less than the purchase price.

Great Northern Trust Co. v. Lynch, Collector, p. 241.

Profits on sale of property are to be determined not by bookkeeping facts but by real facts.

United States v. Guggenheim Exploration Co., p. 544.

In computing the cost of bonds for the purpose of determining taxable profit thereon, interest from date of payment to date of receipt of bonds, which was not in fact paid, may not be included.

Walsh v. Brewster, p. 592.

Where there is no established market to serve as a guide, the question of value on March 1, 1913, even of tangible assets, is one largely of judgment and opinion, and the same is even more true of intangible assets. Several methods are suggested which may be utilized.

A. R. M. 34, p. 682.

For the purpose of determining the fair market value of stock on March 1, 1913, market quotations as of that date must be used rather than book values of the assets.

A. R. R. 33, p. 625.

In determining profit upon property which is not depreciable under income tax laws, the question of depreciation does not enter in.

A. R. R. 249, p. 650.

In computing the cost of stock upon which a stock dividend has been issued, or of the dividend stock, each purchase must be treated separately.
Towne v. McElligott, Collector, p. 501.

Where a corporation gives each shareholder a right to purchase new shares in proportion to the number of old shares owned by him, at one-half of par, the profit from the sale of the new stock should be determined by prorating the entire cost of the old and new stock.
A. R. M. 128, p. 702.

On the sale of stock rights, cost and selling price are determined by assuming that the stockholder, instead of selling his rights, subscribed for new shares and sold them, and the gain taxable to a stockholder who sells his rights is equal to the gain taxable to a stockholder who subscribes for new shares and sells his new shares.
Miles, Collector, v. The Safe Deposit & Trust Co. of Baltimore, Guardian, p. 941; affirming case below, p. 439.

(c) Reorganizations and Exchange of Property

Where stock in a reorganized corporation is received in exchange for stock of the old company, there is a closed transaction which may result in taxable profit, under the Act of 1916, even though the beneficial interest remains the same.
A. R. M. 67, p. 693.

NOTE.—This ruling is superseded by the express exemption in the Act of 1921, section 202 (c) (2).

If, upon the sale of capital assets of a corporation to another corporation, shares of stock are surrendered by the old stockholders to the vendor corporation, the nature of the transaction is not thereby changed from one of the sale by the corporation to one of sale of stock by the stockholders.
A. R. M. 21, p. 678.

A bona fide exchange of stocks for other property is not a sale thereof from which profits are derived liable to taxation as income under Acts from August 5, 1861, to March 2, 1867.
United States v. Smith, p. 573.

(4) Interest Received

Taxes upon interest accruing upon bonds containing tax-free covenants withheld and paid by the corporate obligor constitutes taxable income of the obligee.
Massey v. Lederer, Collector, p. 934.

Interest paid by tenant companies in behalf of the lessor company is taxable income of the latter.
Houston Belt & Terminal Co. v. United States, p. 265.

Under a state act, money received by a pawnbroker by way of interest on loans made by him was held to be taxable as interest received from money at interest, and not as income derived from a business.
Goldman v. Trefry, p. 233.

Money owing to a taxpayer is income accrued from the time when the liability to pay becomes absolute, although it is not yet due, and so, interest on corporate bonds due March 1, 1913, does not constitute taxable income under the Act of October 3, 1913.
Plant v. Walsh, Collector, p. 961.

Interest accrued but not actually collected was not income under the 1909 act.

Walker, Collector, v. Gulf & I. Ry. Co. of Texas, p. 591.

Interest which accrued prior to 1909 but was paid in 1911 is not income within the provisions of the Act of Aug. 5, 1909.

Northern Pacific Railway Co. v. Lynch, p. 375.

(5) Dividends

(a) Dividends Held Taxable

Dividends held taxable even though paid from earnings or surplus accumulated prior to the effective date of the statute.

Lynch, Collector, v. Hornby, p. 321.
Union Pacific Coal Co. v. Skinner, p. 515.
State ex rel. Sallie F. Moon Co. v. Wisconsin Tax Commission, p. 484.
Van Dyke v. City of Milwaukee, p. 584.
United States v. Philadelphia B. & W. Ry. Co., p. 561.

Dividends received upon stocks of corporations conclusively presumed to be earnings or profit and therefore ''income'' under a state act.

State ex rel. Pfister v. Widule, p. 481.
Van Dyke v. City of Milwaukee, p. 584.

A state tax on money received as dividends held valid as a property tax and not as an income tax.

Loring v. City of Beverly, p. 315.

Distributions to depositors of profits of a bank are dividends and not interest.

Cary v. Savings Union, p. 129.

Tax on dividends not unconstitutional because corporation also taxed on property and franchises.

Wells ads. Alderman, p. 599.

Dividends received on stock of a corporation, the sole income of which consists of dividends of another corporation, may be taxed.

State ex rel. Moon et al. v. Nygaard, p. 470.

(b) Non-Taxable Distributions

Corporate dividends declared prior to March 1, 1913, and payable subsequent to that date, do not constitute taxable income to taxpayers receiving the same.

United States v. Guinzburg, p. 991.
Plant v. Walsh, Collector, p. 961.

Dividends declared from profits accumulated prior to the act are not taxable.

Merchants Insurance Co. v. McCartney, Collector, p. 344.
Bailey, Collector, v. Railroad Co., p. 82.

Earnings and surplus accumulated previous to the taxable year and taken over by a holding company are not taxable as dividends received by the latter.

Gulf Oil Corp. v. Lewellyn, p. 243.

A distribution by a corporation of income which resulted from the payment of a claim for damages which arose prior to March 1, 1913, is not a taxable dividend.

Park v. Gilligan, p. 393.

Where a dividend is a mere bookkeeping act, the corporation declaring it and the one receiving it being in substance identical, it is not taxable.
Southern Pacific Co. v. Lowe, p. 456.

Dividends declared from profits of a corporation already taxed are not again taxable in the hands of the recipient.
Merchants Insurance Co. v. McCartney, p. 344.

Undistributed earnings of a corporation are not taxable to the stockholders.
Ex Parte Ives, p. 205.

Dividends received by a partner, on stock owned by the partnership, need not be included in his individual return as income subject to normal tax.
United States v. Coulby, p. 533.

(c) Liquidation Dividends

A liquidation dividend which distributes the realization of an increase in value of property accruing prior to March 1, 1913, is not taxable.
Lynch, Collector, v. Turrish, p. 322.

Where a corporation distributes a dividend consisting only of earnings or profits, prior to any vote or resolution provided for liquidation of the company, such dividends cannot be regarded as liquidating dividends despite the fact that the stockholders of the company subsequently voted to go into liquidation and distribute its remaining capital.
A. R. M. 93, p. 694.

(d) Stock Dividends

Stock dividends are not taxable, because not income.
Eisner, Collector, v. Macomber, p. 196.
Towne v. Eisner, Collector, p. 500.
United States v. Philadelphia B. & W. R. Co., p. 561.

Stock dividends are taxable income under the Wisconsin Income Tax Act and State Constitution.
State ex rel. Duhaney v. Nygaard, p. 985.

Where a new corporation was formed with the same stockholders as a corporation already existing, and stock of the new corporation was distributed to the stockholders of the old, held that this distribution was not a stock dividend but constituted taxable income of the recipient.
United States v. Phellis, p. 994; reversing case below, p. 404.

Where a new corporation was organized to hold property which had represented surplus of an existing corporation and the stock of the new corporation is distributed directly to the stockholders of the old, the distribution is a taxable dividend.
Rockefeller v. United States, p. 970; affirming case below, p. 367.

Stock received by a stockholder of a corporation as a bonus for a stock subscription held not taxable income.
United States v. Mellon, p. 992; affirming case below, p. 551.

Cash and shares of stock received by a shareholder in full settlement of dividends in arrears on cumulative preferred stock held to constitute a dividend under a state income tax law.
Wilder v. Trefry, p. 607.

(e) Dividends Paid in Property

A distribution of stock of another corporation is not a stock dividend, and is taxable.
Peabody v. Eisner, Collector, p. 394.

Dividends paid in debenture bonds of the corporation are taxable income to the recipients.
Doerschuck v. United States of America, p. 183.

Scrip dividends were taxable under the Act of June 30, 1864.
Bailey, Collector, v. Railroad Co., p. 82.

(6) Rents and Royalties

An income tax upon rentals is not a tax upon the property rented.
Rensselaer & S. R. Co. v. Delaware & H. Co., p. 427.

Where a film corporation agreed to pay to certain manufacturers of moving picture films, who were the holders of all its common stock, for the use of their films, the balance of its net profits after deducting certain percentages for dividends on its stock, such payments were held to be rent and not payments in the nature of dividends.
In re General Film Corporation, p. 901.

Rent paid direct to its stockholders, instead of to the lessor corporation, is income of the latter.
Anderson v. Morris E. E. R. Co. et al., p. 75.
West End St. Ry. Co. v. Malley, Collector, p. 600.
Blalock v. Georgia Ry. & Electric Co. p. 96.

Royalties received by the owner of a mine are income, and not the proceeds of property sold.
Von Baumbach, Collector, v. Sargent Land Co., p. 590.
Pfister Land Co. v. City of Milwaukee, p. 402.

A covenant by a lessee to pay taxes held not to include the income tax on rentals received by the lessor.
Codman v. American Piano Co., p. 145.
Catawissa R. Co. v. Philadelphia & R. Ry. Co., p. 131.
Little Schuylkill, etc., Co. v. Philadelphia & Reading Ry. Co., p. 313.
Van Rensselaer v. Dennison, p. 585.

Other leases construed to require such payment by the lessee.
North Pennsylvania R. Co. v. Philadelphia & R. Ry. Co., p. 374.
Suter v. Jordan Marsh Co., p. 497.
Ehrlich et al. v. Brogan et al., p. 195.

(7) Miscellaneous Forms of Income

Debts of a railroad company written off by it because outlawed are income to the company for the year in which written off.
Great Northern Trust Co. v. Lynch, Collector, p. 241.

Where the sole stockholder of a corporation released a debt which the corporation owed him, the amount thereof was held to be a contribution of capital, and not income.
United States v. Oregon-Washington Railroad & Navigation Co., p. 558.

Where bonds are redeemed for less than their par value for which they were issued, the difference is taxable income to the corporation for the year in which redemption is made, despite the fact that the market value of the bonds was no greater on March 1, 1913, than when redeemed.

A. R. R. 545, p. 675.

A building erected by a lessee held, under the terms of the lease, to have become income of the lessor in the year when erected, and not in the year when the lessor acquired possession of the same.

Miller v. Gearin, p. 351.
Cryan v. Wardell, Collector, p. 163.

(D) Deductions From Gross Income

(1) Expenses of Carrying on Business

(a) Nature of Expense

By the operating expenses of a railroad company is meant the payment for labor and materials which go into the actual operating of the road and property.

Grand Rapids & Indiana Ry. Co. v. Doyle, Collector, p. 238.

A corporation may not deduct money advanced to a subsidiary company to pay the latter's operating expenses.

Walker v. Gulf & I. Ry. Co. of Texas, p. 591.

(b) Business and Personal Expenses Contrasted

A lawyer, acting as the executor in a single estate, is not conducting a "trade or business"; a single, isolated activity of the character of an executorship does not constitute a trade, business, profession or vocation.

Lederer, Collector, v. Cadwalader, p. 920; affirming case below, p. 617.

Such portion of the upkeep and operating expenses of the taxpayer's automobile as is occasioned by its use in his business is a proper deduction as a business expense.

A. R. R. 266, p. 654.

Losses incurred in operation of a farm during period of administration of an estate are deductible though the farm was operated by decedent as a hobby, and though similar losses, if incurred in his lifetime, would not have been deductible.

A. R. R. 249, p. 650.

A person cultivating and operating a farm for recreation or pleasure, other than on the recognized principles of farming, is not engaged in the business of farming.

Fish v. Irwin, p. 216.

The mere fact that a heavy loss is incurred in the initial stages of operating a farm does not necessarily show that the farm is operated for pleasure, and, even if this is not so, farming when engaged in as a regular occupation and in accordance with recognized business principles is none the less a business because the person engaging in it is willing to do so without regard to its profitableness because of the pleasure derived from it.

Plant v. Walsh, Collector, p. 961.

Alimony paid is not deductible.

Gould v. Gould, p. 237.

(c) Permanent Investments

Expenditures by a public utility company for new service connections and extensions are a permanent investment in improvements and are not deductible. Union Hollywood Water Co. v. Carter, Collector, p. 514.

The excess of the cost of new equipment over old and the cost of additional equipment represents an addition to the value of property and is not deductible as expense.
Grand Rapids & Indiana Ry. Co. v. Doyle, Collector, p. 238.
In re Income Tax Appeal Cases, p. 270.

Cost of new buildings for laborers' quarters is not a deductible expense.
In re Income Tax Appeal Cases, p. 270.

In computing net income no deduction shall be allowed on account of expenditures for new buildings, or for permanent improvements or betterments. Kemper Military School v. Crutchley, p. 281.

The expense of clearing new land for raising a crop of sugar in a future year is not deductible for the year in which incurred.
In re Income Tax Appeal Cases, p. 270.

Amounts expended by a surveyor in buying instruments and books are not necessary expenses in carrying on his business.
In re Smith, p. 455.

Attorneys' fees paid in litigation for the mastery of certain stock, resulting in practically the ownership or control thereof and the consequent management of a company, constitute a capital investment, and are not deductible from income derived from such business as a necessary expense.
Laemmle v. Eisner, Ex-Collector, p. 917.

Amounts expended by a corporation after acquisition of a patent, in defending its title, are not a part of the cost of the property and so are deductible as a business expense.
A. R. R. 98, p. 635.

Premiums paid by a corporation for insurance on the lives of its officers or employees payable to the corporation cannot be deducted as expenses.
A. R. R. 229, p. 649.

(d) Activities Other Than Business

A lawyer who happens to be an executor and trustee of a deceased friend is not engaged in the business of acting as a fiduciary.
Lederer, Collector, v. Cadwalader, p. 920; affirming case below, p. 617.

(2) Inventories

Transactions in "futures" unclosed at the end of the taxable year form no integral part of the cost of the commodities included in the taxpayer's physical inventory.
A. R. M. 100, p. 697.

Carrying charges actually paid or accrued on liquor in bond are, under certain circumstances proper additions to the cost price of such liquor for the purpose of inventory.
A. R. R. 140, p. 642.

Goods sold in one year and taken back in the following year may not be included in the seller's closing inventory for the year of sale; the loss is one for the year in which the goods were returned and not for the year of sale.

A. R. R. 155, p. 642.
A. R. M. 129, p. 703.

Monthly average cost method of taking inventory in the tobacco industry is recognized and permitted, since no other method more nearly approaching theoretical accuracy is practically possible.

A. R. R. 18, p. 622.

There is no warrant in the law for permitting liquor dealers to inventory their stock on December 31, 1919, at nothing for income tax purposes with the understanding that should the goods be sold later the full amount received therefrom must be treated as income.

A. R. M. 33, p. 681.

A taxpayer is bound by the option he has exercised in prior years of including excise taxes in the cost of merchandise in calculating his inventory, rather than to charge them to business expense.

A. R. M. 121, p. 678.

When change of basis of pricing inventories will be permitted, and effect of change on prior returns considered.

A. R. M. 38, p. 687.

(3) Salaries

For cases dealing with the reasonableness of particular salary deductions see the following:

A. R. M. 39, p. 688.
A. R. M. 30, p. 681.
A. R. R. 223, p. 648.
A. R. R. 390, p. 668.
A. R. R. 435, p. 670.
A. R. R. 519, p. 674.

The government does not have the right to inquire into and determine whether a salary, paid by a corporation and deducted in its return, is reasonable and fair compensation for the services rendered, but it may show, not that the salary is too high, but that the whole or some part of it is not salary at all, but is profit diverted to a stockholding officer under the guise of salary and as such is subject to taxation.

United States v. Philadelphia Knitting Mills Co., p. 563.

When the evidence for the government is sufficient to sustain a finding by fair-minded men that a part, and a definite part, of compensation paid to an officer as salary was really profits distributed by reason of his stockholding, a prima facie case for the jury has been established.

United States v. Philadelphia Knitting Mills Co., p. 563.

Amounts paid by a corporation to stockholding employees on the basis of the stockholdings of the parties and in addition to salaries of fixed amounts cannot be allowed as salary deductions but must be treated as dividends. Jacobs & Davies, Inc. v. Anderson, Collector, p. 274.

Additional compensation fixed in a year subsequent to year in which services were rendered, is deductible for year in which paid and not for year when services were rendered.

A. R. R. 232, p. 650.
A. R. R. 519, p. 674.

(4) Repairs, Renewals, and Replacements

Maintenance means the upkeep or preserving of the condition of the property to be operated.

Grand Rapids & Indiana Railway Co. v. Doyle, Collector, p. 238.

Annual replacements on account of wear and tear should properly be charged to maintenance.

Mutual Benefit Life Ins. Co. v. Herold, Collector, p. 355.

An insurance company may deduct from gross income the amount expended for alteration of its home office.

Eaton, Collector, v. Connecticut General Life Ins. Co., p. 189.

(5) Reserves of Insurance Companies

The deduction of the net addition to a reserve fund required by law, which is allowed to insurance companies, may include a reserve based upon the value of policies on which the premiums are due and uncollected.

Prudential Ins. Co. v. Herold, Collector, p. 414.

Since certain supplementary policy contracts were required by law to be represented in a reserve fund, so much of the fund as is annually set apart for that purpose is deductible by an insurance company.

Mutual Benefit Life Ins. Co. v. Herold, Collector, p. 355.

Additions to reserve fund of an insurance company because of liability on supplementary contracts not involving life contingencies are not deductible under the statute because not required by law.

Fink, Collector, v. Northwestern Mut. Life Ins. Co., p. 210.

Additions to reserves held against losses, incurred and contingent, were not required by law, and therefore, were not deductible by an insurance company.

McCoach, Collector, v. Insurance Company of North America, p. 338.

National Life & Accident Ins. Co. v. Craig, Collector, p. 361.

A reserve for the running expenses of the business is not a reserve required by law, and so additions to such a reserve are not deductible.

Maryland Casualty Co. v. United States, p. 332.

(6) Interest

When an act by specific provision places a limitation upon the amount of interest which may be deducted, an additional deduction cannot be sustained under another section as an ordinary and necessary expense.

Anderson, Collector, v. Forty-two Broadway Co., p. 74.

Middlesex Banking Co. v. Eaton, Collector, p. 350.

Interest paid by a stockbroker on money borrowed to buy and carry securities for customers, who in turn paid interest on their indebtedness to it, held to be interest paid on an indebtedness of the broker and not on indebtedness of the customers.

Altheimer & Rawlings Inv. Co. v. Allen, Collector, p. 67.

Where interest upon an old note has been capitalized by giving a new note representing principal and accrued interest on the old note, only the interest accrued upon the new note is an allowable deduction.

A. R. R. 113, p. 638.

Where bonds are issued by a corporation at a discount, the total amount of the discount may not be deducted in the year of issue but must be prorated over the life of the bonds.

Baldwin Locomotive Works v. McCoach, Collector, p. 83.

Sums of money reserved and set aside each year by a corporation as the pro rata amount of a discount on bonds issued by it cannot be deducted under the Act of August 5, 1909, for such amounts do not represent losses actually sustained within the year.

Southern Pac. R. Co. v. Muenter et al., p. 457.

Where, prior to 1909, a corporation issued its bonds at a discount and charged off the entire loss on its books, it was held that it could not in a later year re-open its books and make a deduction for a proportionate amount of the loss.

Chicago & Alton R. R. Co. v. United States, p. 137.

(7) Taxes

A tax does not accrue until it becomes a liability to the taxpayer and, therefore, an additional state tax upon income of a corporation, levied under a law enacted in 1919, on the basis of its income tax return for the year 1918 is not an allowable deduction in a federal income tax return for the calendar year 1918.

Schuster & Company, Inc., v. Williams, Collector, p. 974.

The federal estate tax paid by the executors of an estate is an allowable deduction in ascertaining the net taxable income of the estate.

United States v. Woodward, p. 580.

But it is not an allowable deduction in ascertaining the net taxable income of the decedent in the return filed for him by the executors of his estate.

Catherwood v. United States, p. 858.

An inheritance tax paid by a legatee under a state act is not a proper deduction in the return of the legatee.

Prentiss v. Eisner, p. 413.

A corporation may not deduct taxes paid in its behalf by another corporation when it has not included the amount thereof in its gross income.

United States v. Aetna Life Ins. Co., p. 519.

Taxes levied upon the shares of stock in banks and other corporations, which the corporation is required to pay on behalf of the shareholders, may not be deducted from the income of the corporation.

Elliott National Bank v. Gill, p. 199.
First National Bank of Jackson v. McNeel, p. 214.
Northern Trust Co. v. McCoach, Collector, p. 378.

If, however, the primary obligation of the tax is upon the corporation, it is deductible.

United States v. Guaranty Trust & Savings Bank, p. 542.

A citizen of the United States resident in the Philippine Islands is entitled to a credit for the amount of taxes paid to the Philippine Islands during the year.

Lawrence v. Wardell, Collector, p. 304.

(8) Losses

(a) Losses Incurred in Trade or Business

The phrase "losses incurred in trade" relates only to losses in the actual business of the taxpayer, as distinguished from losses in isolated transactions entered into for profit but not connected with his business.

Mente v. Eisner, p 343.

Where a taxpayer, although engaged in other business, made a profit from speculation in stock, which profit was embezzled by a broker, held that he was entitled to a deduction for such loss as a loss incurred in trade or business.

Black v. Bolen, Collector, p. 95.

Losses incurred through accepting stock, which subsequently became worthless, in exchange for various materials and claims of the taxpayer, held deductible as losses incurred in trade.

Bryce et al. v. Keith, Collector, p. 115.

Loss upon sale of an individual's residence is not deductible.

A. R. R. 249, p. 650.

The same was held, even though the sale was caused by the taxpayer's acceptance of a business position in a different part of the country.

A. R. R. 96, p. 634.

(b) Other Losses

Where old buildings are abandoned for newer ones but are left standing, no deductible loss arises.

Hawaiian Commercial & Sugar Co. v. Tax Assessor & Collector, p. 251.

Where a steamer was condemned by federal inspectors and subsequently broken up and sold for a small sum, held that the entire difference between its original cost and selling price was not deductible as a loss for the year of sale.

In re Wilder's Steamship Co., p. 605.

In determining whether or not a debt is worthless, the taxpayer need only exercise his discretion fairly and honestly; a suit at law or in equity for ascertaining the debt to be worthless is unnecessary.

United States v. Frost, p. 539.

The amounts at which debts stand on the books of the taxpayer at a given time are at least prima facie evidence of their actual value at that time.

Plant v. Walsh, Collector, p. 961.

Where a corporation distributes, in the form of a dividend, certain securities held by it, there is a deductible loss in case the value of the securities at that time is less than their value when acquired, or their value on March 1, 1913. A. R. R. 435, p. 670.

(c) When Losses Are Deductible

A loss suffered in one year through a destruction of property but not deducted because of absence of any net income for that year, cannot be deducted in a subsequent year when the property destroyed is replaced.

A. R. R. 97, p. 635.

A taxpayer who bought a guano bed and years later discovered it contained only one-half of what it had been estimated to contain, held not entitled to a deduction for a loss in the year of such discovery.

In re Pacific Guano & F. Co., p. 390.

A loss through burglary is deductible only in the year in which sustained, and the matter of litigation upon insurance policies with respect to liability for such loss can have no effect upon the time when the loss was actually sustained.

A. R. R. 542, p. 674.

The actual value of a debt on March 1, 1913, does not control the amount of the deduction allowed to the taxpayer where such debt is subsequently ascertained to be worthless and charged off.

Plant v. Walsh, Collector, p. 961.

(9) Depreciation

(a) Definition

Depreciation of a building means physical deterioration; it does not take into account depreciation in value due to a loss in rental value because of the construction of more modern buildings with improved facilities, or due to a change in the neighborhood.

Cohen v. Lowe, Collector, p. 147.

Depreciation is not to be confused with ordinary repairs; it is intended to cover the estimated lessening in value of the original property due to wear and tear, decay or gradual decline from natural causes, which at some time in the future will require the abandonment or replacement of the property, in spite of current ordinary repairs.

San Francisco & P. S. S. Co. v. Scott, Collector, p. 441.

If, due to repairs and renewals, the value of property at the end of the year is as great as at the beginning, there is no depreciation in value within the meaning of the law.

Nashville, Chat. & St. Louis Railway Co. v. U. S., p. 358.

A railroad company is not entitled to a deduction for depreciation suffered by individual units of property, where such depreciation is fully overcome by appreciation in other units, so that at the end of the year the railroad is as valuable as at the beginning of the year.

Nashville, Chat. & St. Louis Railway Co. v. U. S., p. 358.

A corporation cannot be denied a deduction on account of depreciation actually sustained and charged off, even though after paying dividends there remains an amount of surplus and earnings insufficient to cover depreciation.

A. R. M. 112, p. 702.

The term "depreciation" does not include depletion of mines.

Pfister Land Co. v. City of Milwaukee, p. 402.
Stratton's Independence v. Howbert, p. 493.
Von Baumbach, Collector, v. Sargent Land Co., p. 590.

A lessee of a mine paying a royalty is not entitled to deduct from gross income depreciation for ore mined, in addition to sums paid as royalties.

Klar Piquett Mining Co. v. Town of Platteville, p. 288.

Amortization of bonds does not come within any definition of depreciation as used in the statute.

Fink, Collector, v. Northwestern Mut. Life Ins. Co., p. 210.

Shrinkage in market value of securities held to be depreciation within the meaning of the Act of August 5, 1909.

New York Life Insurance Co. v. Anderson, p. 363.

(b) Rates of Depreciation

The annual depreciation of a building is an amount represented by a fraction having one, the tax year, for the numerator, and the number of years representing the ascertained life of the building as the denominator; this assumes that there would be an average deterioration suffered each year by the building, and that the building would be kept in good repair during its life.

Cohen v. Lowe, Collector, p. 147.

Deductions for depreciation must be reasonable within meaning of the act.

United States v. Nashville C. & St. L. Ry., p. 553.

Court passed on question of adequacy of depreciation and found that Commissioner had not allowed adequate depreciation.

Camp Bird, Ltd. v. Howbert, Collector, p. 123.

Where delicate machinery designed for manufacture of a certain product is used in manufacturing a product of much coarser materials for which use it is not fitted, and is operated at a heavy overload of its normal capacity, extraordinary depreciation may be deducted.

A. R. R. 45, p. 628.

Three per cent is a reasonable allowance for depreciation of bulk freight steamships on the Great Lakes.

A. R. R. 27, p. 625.

The proper rate of depreciation on steam schooners engaged in the coastwise lumber trade is 5 per cent.

A. R. R. 279, p. 655.

Where a taxpayer did not elect during the life of patents to take a deduction for their depreciation, he is not entitled to such a deduction in a year after the patents have expired.

A. R. M. 95, p. 696.

(10) Depletion of Natural Resources

Under the Act of August 5, 1909, no deduction was authorized for the exhaustion of ore bodies.

Goldfield Consolidated Mines Co. v. Scott, Collector, p. 231.
Stratton's Independence v. Howbert, p. 493.
Von Baumbach, Collector v. Sargent Land Co., p. 590.

Owner of mining leases acquired before March 1, 1913, held entitled to a depletion allowance, based on value of interest on March 1, 1913, where mines had been thoroughly developed at that time; and method of determining such value explained.

Alworth-Stephens Co. v. Lynch, p. 835.

Lessee of mine held not entitled to deduction from gross income of value of ore mined, representing its value in place when the law took effect, since the lease confers only the privilege of taking the ore, and does not convey the legal title to the ore in place.

United States v. Biwabik Mining Co., p. 526.

The statutory deduction for depletion cannot be twice credited, once to the fee owner and once to the lessee, the exemption belonging by right to the fee owner.

Weiss, Collector, v. Mohawk Mining Co., p. 598.

A taxpayer is not barred from claiming depletion by reason of having carried on its books a certain sum of money as surplus which should have been carried as a depletion reserve.

Forty Fort Coal Co. v. Kirkendall, Collector, p. 223.

A lessor of mining property who receives, in a given year, royalties that accrued over several years, and who reports income on a receipt basis, may deduct from the royalties received such part of the depletion allowance as appertains to those royalties.

A. R. M. 17, p. 678.

(11) Contributions to Charities

Donations by a corporation are not deductible even though the corporation is a "close" or "family" one.

A. R. R. 373, p. 665.

IV. Returns and Payment of Tax

(1) Necessity for Filing Returns.

Every corporation organized for profit must file a return even though having income insufficient to create a tax liability.

United States v. Acorn Roofing Co., p. 518.
United States v. Military Const. Co., p. 553.
Fontenot, Collector, ads. Accardo, p. 222; same case above, p. 895.

While the fact that a taxpayer sought and obtained legal advice, in and of itself, might not be sufficient to excuse its failure to file a return, nevertheless it tends to show that the taxpayer was acting in good faith, and in the absence of circumstances casting doubt upon its good faith, its ignorance of its liability to pay a tax is sufficient to constitute a reasonable cause for failure to make and file a return within the prescribed time.

Dayton Bronze Bearing Co. v. Gilligan, Collector, p. 875.

Where a new corporation comes into existence which takes over the property of an old corporation, both the old and the new will be required to file separate returns covering the periods of the year during which they were in active control of the business.

A. R. R. 285, p. 656.

The dissolution of a corporation before the return is due does not relieve it of tax liability which was incurred before dissolution.

United States v. General Inspection & Loading Co., p. 540.
Overland Sioux City Co., Inc., v. Clemens, p. 387.

(2) Returns Negligently Understated

An understatement on a return which is due to an honest misunderstanding of facts or law, of which an average reasonable man might be capable, is not due to negligence if a full disclosure is made in the return, and penalty should not be asserted.

A. R. R. 360, p. 664.

Penalties for negligence in incorrectly reporting invested capital should not attach in any case where the return makes full disclosure of the amount of appreciation included or other items upon which the computation is otherwise not in accordance with the regulations, permitting the Department to make assessment of additional taxes if it desires to do so.

A. R. M. 105, p. 699.

An error in an item upon which the return contained no special instructions and as to which many lawyers and accountants differed, the Bureau of Internal Revenue not having settled its practice at the time of filing the return, would be an error due to an honest misunderstanding of the facts or law of which an average reasonable man might be capable and penalty for negligence should not be asserted.

A. R. R. 360, p. 664.

Where the amortization tentatively claimed is in excess of that allowed by the regulations, the 5% penalty and interest at 1% per month should attach only on additional tax due by reason of the amount disallowed as excessive upon final settlement.

A. R. M. 24, p. 680.

Where a taxpayer submits a return ignoring, or in conflict with, specific provisions of the law and regulations, he is presumed to have been negligent even though he is able to show that in doing so he relied upon some other person (not connected with the internal revenue service) who prepared the return or advised as to its preparation. This presumption may be rebutted in extraordinary cases.

A. R. M. 23, p. 679.

In questions involving judgment, such as the amount deductible for depreciation or salaries and the like, the taxpayer may differ with the Bureau and yet not be chargeable with negligence.

A. R. M. 23, p. 679.

(3) Prosecution for Fraudulent and False Return

The offense of unlawfully attempting to evade the tax consists of two elements—false return with intent. Perjury is not involved.

Levy v. United States, p. 308.

A false amended return may be the basis for criminal prosecution.

Levy v. United States, p. 308.

Evidence held sufficient to sustain a conviction for unlawfully attempting to evade the tax, but insufficient for perjury.

Levy v. United States, p. 308.

If one acts fairly and honestly in determining what debts are ''ascertained to be worthless,'' he is not guilty of filing an untrue return.

United States v. Frost, p. 539.

Failure to keep books as provided by statute is not an implication of bad faith or intent to defraud the government.

Hubbard v. Brainard, p. 266.

(4) Prosecution for Perjury in Returns

In a prosecution for perjury, proof both that an oath was administered and that the officer was authorized to administer it is essential to conviction.

Levy v. United States, p. 308.

The administration of an oath by one of the persons authorized by local law to take oaths in their several districts, as the Commissioner of Deeds in New York, is sufficient to sustain a conviction for perjury.

United States v. Benowitz, p. 525.

To convict for perjury it must be shown that the oath was false and that the accused knew that it was not true, or that he took it rashly without knowing whether it was true or not.

United States v. Mayer, p. 549.

Contradictions in two affidavits do not amount to perjury. Evidence held insufficient to sustain a conviction for perjury.

Levy v. United Sates, p. 308.

(5) Administration and Procedure

See this synopsis under this general heading, applicable to all internal revenue taxes.

The last day of the taxable year is the ''assessment day'' of the income tax, fixed by the Act of October 3, 1913.

Kimball v. Cotting et al., p. 285.

(6) Payment of Tax

A payment of taxes to a deputy collector other than the deputy assigned to the portion of the district within which the taxes are levied or assessed is unauthorized by law, and a taxpayer making payment to such deputy must stand a loss where there is no proof that the same was ever received by the collector.

Hurst v. Lederer, Collector, p. 910.

(7) Payment at Source

(a) Non-resident Aliens

A non-resident alien may be taxed at the source on income received from within the United States.

United States v. Erie Railroad Company, p. 537.

(b) Tax Free Bonds

A clause in a bond held not to require the debtor to pay income tax, as same is imposed not against the bond or interest, but against the income of the holder.

Urquhart v. Marion Hotel Co., p. 583.

A debtor may not deduct from the interest an alleged tax where it appears that the tax was not properly imposed upon the interest in question.

Northern Central Ry. Co. v. Jackson, p. 375.

An agreement by a railroad company to pay all expenses incidental to the issue of certain bonds cannot be extended to cover an excise tax on the interest paid on such bonds, levied under an act passed subsequently to the making of the agreement.

Baltimore v. Baltimore Railroad, p. 84.

A tax-free provision in a mortgage was held not to prevent the mortgagor from deducting income tax from interest on bonds.

Haight v. Railroad Company, p. 245.

(c) Tax-Free Rent

For cases dealing with the liability of lessee for income taxes under the terms of a lease, see

Kimball v. Cotting et al., p. 285.
Des Moines U. Ry. Co. v. Chicago G. W. Ry. Co., p. 179.
Suter v. Jordan Marsh Co., p. 497.

CAPITAL STOCK TAX

(A) Inactive Corporations

A corporation which merely holds title to property, subject to a long term lease or otherwise out of its control, and which merely receives the income from such property and distributes the same as dividends, or does such acts as may be necessary to maintain its corporate franchise, is not "carrying on or doing business" within the meaning of the statute.

Zonne v. Minneapolis Syndicate, p. 616.
United States v. Emery, Bird, Thayer Realty Co., p. 536.
Jasper & E. Ry. Co. v. Walker, Collector, p. 276.
McCoach v. Continental Passenger Ry. Co., p. 337.
McCoach, Collector, v. Minehill & S. H. R. R. Co., p. 339.
Maxwell, Collector, v. Abrast Realty Co., p. 335.
State Line & S. R. Co. v. Davis, p. 485.
New York Central & H. R. R. Co. et al. v. Gill, Collector, p. 362.
New York Mail & Newspaper Trans. Co. v. Anderson, p. 364.
Public Service Ry. Co. v. Herold, Collector, p. 415.

Anderson, Collector, v. Morris & E. R. Co., et al., p. 75.
Old Colony R. Co. v. Gill, p. 381.
Waterbury Gas Light Co. v. Walsh, Collector, p. 595.
West End St. Ry. Co. v. Malley, Collector, p. 600.
Miller v. Snake River Valley R. Co., p. 352.
Wilkesbarre & W. V. Traction Co. v. Davis, Collector, p. 603.
Bryant & May, Ltd., v. Scott, Collector, p. 114.
Lewellyn, Collector, v. Pittsburgh, B. & L. E. R. Co., p. 309.
Dayton & Western Traction Co. v. Gilligan, Collector, p. 169.
Traction Cos. v. Collectors of Internal Revenue, p. 503.
Cambria Steel Co. v. McCoach, p. 121.

A holding company which does nothing more than receive and distribute income from subsidiary operating companies is not ''carrying on or doing business.'' Butterick Co. v. United States, p. 117.
United States v. Nipissing Mines Co., p. 557.

(B) Active Corporations

A corporation which is doing that for which it was organized is ''carrying on or doing business.''
Von Baumbach v. Sargent Land Co., p. 590.
Rio Grande Junction Ry. Co. v. United States, p. 431.
Chemung Iron Co. v. Lynch, p. 135.
Boston Terminal Co. v. Gill, Collector, p. 100.
Associated Pipe Line Co. v. United States, p. 79.
Com'l Travelers Life & Accident Ass'n v. Rodway, Collector, p. 152.

Business is that which occupies the time, attention and labor of men for the purpose of a livlihood or profit.
Flint v. Stone-Tracy Co., p. 217.

A corporation, organized to purchase land and construct thereon a hotel and to operate, manage or lease, mortgage or sell the same, which secured the land, built a hotel and leased the same to another corporation, the lessee paying a rent determined by the amount of the profits, held to be carrying on business.
Detroit Hotel Co. v. Brady, Collector, p. 878.

Corporations organized for the purpose of doing business and engaging in such activities as leasing property and collecting rents are engaged in business. Flint v. Stone-Tracy Co., p. 217.

(C) Determination of Tax

It is, for purposes of the capital stock tax, immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value, and an association can not escape taxation by adopting the modern theory of no par value for its stock.
Malley, formerly Collector, v. Howard, et al., Trustees, p. 928.

In determining the fair value of the capital stock of a concern, the Government is not restricted to the value shown upon the books, but may determine the value of the business and property as a going concern, and in so doing has the right to look to the net worth of the assets, including its surplus and undivided profits, as shown by its books, and also to the franchises, good will, outstanding contracts, earning capacity, and market value of its stock.
Central Union Trust Co. v. Edwards, Collector, p. 860.

ESTATE AND INHERITANCE TAXES

(A) Constitutionality and Nature

The constitutionality of Federal estate and succession taxes was upheld in the cases below, over the following objections: (a) a direct tax not apportioned, (b) an interference with the exclusive rights of the states to regulate descent and distribution, and (c) lack of uniformity.

Knowlton v. Moore, p. 289.
McElligott, Acting Collector, v. Kissam et al., p. 340; same case, p. 915.
New York Trust Co. v. Eisner, p. 370.
Shwab v. Doyle, p. 451; affirmed, p. 975.

A state statute providing for a tax of 2% of its appraised value for five years preceding the date of death of a decedent upon property of his estate which escaped a town or city or state tax during the year preceding his death is not a succession tax, but a penalty, and, as such, is constitutional.

Bankers' Trust Co. v. State, p. 849.

The right to dispose of one's property by will and the right to have it disposed of by the law after decease is created by statute, and therefore the state may impose such conditions upon the exercise of this right as it may determine.

Bankers' Trust Co. v. State, p. 849.

A state may constitutionally tax a bequest to the United States, since the legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax.

Plummer v. Coler, p. 963.
Snyder v. Bettman, p. 983.

Likewise, the federal government may tax a bequest to a state.

Snyder v. Bettman, p. 983.
United States v. Perkins, p. 993.

A state may constitutionally impose an inheritance tax upon a legacy consisting of United States bonds.

Plummer v. Coler, p. 963.

Likewise, the federal government may constitutionally require that state securities be included in the estate subject to tax.

Greiner, Executrix, v. Lewellyn, Collector, p. 902.

A state legislature can not constitutionally place a transfer tax upon the surviving tenant by the entirety in the same manner as though the whole property belonged to the deceased tenant in a case where, although the deceased tenant died after the passage of the taxing act, the estate by the entirety was created before its passage.

In re Lyon's Estate, p. 927.

The Federal estate tax is not a tax on the property of the decedent, but upon its transfer or transmission by will or descent from the decedent.

Randolph v. Craig, Collector, p. 420.

The Federal inheritance tax is an excise tax, levied on the estate transmitted from the living to the dead and so the court is not concerned with the proper division of the tax as between the heirs and the widow.

Liebman v. Fontenot, Collector, p. 921.

The Federal estate tax is a charge against the estate of the decedent and so is not apportionable to the legacies in the final account of the executors.

In re Hamlin, p. 248.
In re Lord's Estate, p. 315.

The Federal estate tax is a charge against every portion of the estate, and upon distribution, realty, as well as personalty, should bear its proportionate part of the tax.

Hampton v. Hampton, p. 249.

(B) Gross Estate

A revocable trust is not such a transfer as will exempt the property thereby conveyed from payment of an inheritance tax upon the death of the creator of the trust.

Bullen v. Wisconsin, p. 116.

In view of the rights reserved to the donor in a certain trust instrument, some of which were tantamount to a power of revocation, so far as the beneficiaries were concerned, others of which enabled the donor to keep a firm hold on the management, control and disposition of the trust estate during his life, held that the trust was one intended to take effect in possession or enjoyment at or after the death of the donor.

Congdon v. Lynch, p. 865.

For cases dealing with what is a transfer in contemplation of or intended to take effect in possession or enjoyment at or after death, see

Ebersole v. McGrath, Collector, p. 190.
Gaither v. Miles, Collector, p. 227.
In re Kueter's Estate, p. 916.
In re Pauson's Estate, p. 953.
People v. Tavener, p. 959.
Polk v. Miles, Collector, p. 407.
Shwab v. Doyle, pp. 451 and 975.
Vaughan, et al., Executors, v. Riordan, Collector, p. 1002.

The provision in the Revenue Act of 1916 taxing transfers made in contemplation of death is not retrospective in its operation and, hence, a transfer made prior to the passage of the Act is not subject to tax where the transferor died after the Act took effect.

Shwab v. Doyle, Collector, p. 975; reversing case below, p. 451.
Union Trust Company v. Wardell, p. 990; reversing case below, p. 517.
Levy v. Wardell, Collector, p. 921.
Knox v. McElligott, Collector, p. 915; reversing case below, p. 340.
Curley, et al., v. Tait, Collector, p. 871.
Contra but overruled:
Clark, et al., Executors, v. Blalock, Collector, p. 861.
Congdon v. Lynch, p. 865.

NOTE: The 1918 and 1921 Acts are made retrospective in operation by express wording to that effect.

Where a decedent, several years before his death, made a transfer of securities, reserving a certain contingent beneficial interest in himself, it was held that, the tax could not be levied upon the full value of the securities, but only upon the value of the interest which he retained for himself.

Curley, et al., v. Tait, Collector, p. 871.

One-half only of the funds in a joint bank account of decedent and his wife held to be properly included in the gross estate.

Congdon v. Lynch, p. 865.

Whether any part of community property should be included in the gross estate of a deceased spouse under Federal estate tax acts depends upon local state laws.

Blum v. Wardell, Collector, pp. 1004 and 97.

In computing the value of the community property passing to the heirs of a decedent, no deduction should be made for the value of the life usufruct in favor of his wife, with which it is encumbered, in calculating the Federal estate tax under the Revenue Act of 1916.

Liebman v. Fontenot, Collector, p. 921.

Under the Revenue Act of 1916 whether a widow's rights of homestead, dower, and a year's support must be included in the gross estate of her deceased husband in the assessment of the Federal Estate Tax depends upon whether under local state law such rights are vested in her by operation of law independently of her husband or are transmitted to her through him.

Randolph v. Craig, Collector, p. 420.
Title Guarantee & Trust Co. v. Edwards, Collector, p. 988.

NOTE.—The Revenue Acts of 1918 and 1921 provide for inclusion in gross estate of any interest of a surviving spouse, existing at time of decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy.

Under the Revenue Act of 1916 the gross estate of a decedent does not include property passing under testamentary execution of a general power of appointment.

Ebersole v. McGrath, Collector, p. 190.
United States v. Field, p. 538.

NOTE.—The Revenue Acts of 1918 and 1921 expressly include such property in the gross estate.

For cases distinguishing contingent and vested interests, see

Henry v. United States, p. 256.
Simpson v. United States, p. 452.
Lynch v. Union Trust Co., p. 323.
Kahn, et al., Executors v. United States, p. 912.

Where a widow was left an annuity of $25,000 and a power of appointment at her death over $250,000, an estate tax computed upon the sum of $250,000 plus the value of an annuity of $25,000 per year, was excessive; the tax should have been computed upon the sum of $250,000, plus the value of an annuity of $15,000 per year, inasmuch as the $250,000, over which the widow had the power of testamentary appointment, would produce an income of $10,000 per annum, and so $15,000 only would have to be supplied by other portions of the estate.

Dugan et al., v. Miles, Collector, p. 880.

In the assessment of an inheritance tax the use of mortuary tables for determining the present value of future contingent interests is proper.

Simpson et al. v. United States, p. 452.

In assessment of inheritance tax upon a life estate, the actual duration of the tenant's life, and not the fictitious duration derived from mortuary tables, should be used, where the tenant died before the assessment.

Herold, Collector, v. Kahn et al., p. 257.

(C) Deductions

Under Federal estate tax acts no deduction is allowed from gross estate for the amount of the federal estate tax, but the estate passing is treated without regard to the incidence of the tax itself.

Slocum v. Edwards, Collector, p. 977.

Under the Revenue Act of 1916 a state inheritance tax on the rights of individual beneficiaries is not deductible from the gross estate in computing the Federal estate tax.

New York Trust Co. v. Eisner, p. 370.
Title Guarantee & Trust Co. v. Edwards, Collector, p. 988.
Contra but overruled: Sayre et al. v. Brewster, Collector, p. 444.

If, however, the state tax is an estate and not a legacy tax, it is deductible.

Northern Trust Co. v. Lederer, Collector, p. 376.
Curley et al. v. Tait, Collector, p. 873.

NOTE.—Under the Revenue Acts of 1918 and 1921 no estate, succession, legacy, or inheritance tax is deductible.

The Federal estate tax is a proper deduction from the value of the estate in computing a state inheritance tax.

People of State of Illinois v. Northern Trust Co., p. 401.
Bugbee, Comptroller, v. Roebling, et al., p. 853.
In re Inman's Estate, p. 911.
Contra: In re Bierstadt's Estate, p. 90.
Succession of Gheens, p. 986.

In computing the Federal estate tax the amount of the residuary estate passing to charity should be reduced by the state legacy tax payable out of such residuary, but not by the Federal estate tax.

Slocum v. Edwards, Collector, p. 977.

Amounts expended by executors for repairs and upkeep of buildings belonging to an estate and for fire insurance, the same having been allowed in the final account of the executors in the probate court, are proper deductions from the gross estate under the Act of 1916.

Congdon v. Lynch, p. 865.

Under the Revenue Act of 1916 a widow's dower, homestead and year's support, if included within decedent's gross estate, are deductible as charges against the estate.

Randolph v. Craig, Collector, p. 420.

NOTE.—The Revenue Acts of 1918 and 1921 provide for deduction of such amounts reasonably required and actually expended for the support, during the settlement of the estate, of those dependent upon the decedent as are allowed by the laws of the jurisdiction under which the estate is being administered.

(D) Payment of Tax

Under the Third Liberty Bond Act, prescribing that bonds bearing interest at a higher rate than 4% per annum, owned by any person continuously for at least six months prior to his death, are redeemable for estate taxes, the time of prior holding of 4% bonds may not be added to the time following their conversion into 4¼% bonds in order to fulfill the statutory requirement of time.

Smietanka, Collector, v. Ullman, p. 981.

STAMP TAXES

(A) Form and Face of Instrument

The liability of an instrument to a stamp, as well as the amount of the duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside the instrument itself.

Granby Mercantile Co. v. Webster, p. 238.

In settling whether an instrument should be stamped or not, regard is to be had to its form, rather than to its operation; though it may be a device to avoid the revenue acts, and though its operation may have the effect of avoiding them, yet if the device be carried out by means of legal forms, it is subject to no legal censure.

United States v. Isham, p. 545.

(B) Persons Responsible for the Payment of the Tax

Grantee in a deed is required to affix stamps upon failure of grantor to do so.

Home Title Ins. Co. v. Keith, p. 263.

The drawer of a bill is liable for the stamp and so also is any party for whose use or benefit the order is made, signed, or issued.

Granby Mercantile Co. v. Webster, p. 238.

(C) Effect of Failure to Affix or Cancel Stamps

A Federal Act providing that no instruments not duly stamped shall be admitted in evidence in any court will be construed to apply only to proceedings in federal courts and will not be extended to state courts.

Duffy v. Hobson, p. 187.
Knox v. Rossi, p. 292.
Contra: Chartiers & R. T. Co. v. McNamara, p. 133.
Davis v. Evans, p. 167.

Congress is without constitutional authority to control the proceedings of state courts, and, therefore, cannot control the admissibility in evidence in state courts of unstamped instruments.

Duffy v. Hobson, p. 187.
Craig v. Dimock, p. 159.

Unstamped instruments are valid and admissible in evidence even in federal courts when the act providing for the tax does not contain words making such instruments invalid or inadmissible.

Cole v. Ralph, p. 148.

But see, United States v. Masters, p. 548, decided under Revenue Act of 1918, on ground that that act by reference incorporates provisions of unrepealed Act of 1898 with respect to validity and effect of unstamped instruments.

A note which lacks the stamping required by law is not "complete and regular on its face" and hence a purchaser of the same is not a holder in due course.

Lutton v. Baker, p. 323.

A referee in bankruptcy may refuse to accept an unstamped general letter of attorney and may refuse to certify an order unless a stamp is affixed thereto.

In re Hawley, p. 252.

Intent to defraud the government will not be presumed from the mere fact of omission to properly stamp an instrument.

Dowell v. Applegate et al., p. 186.

It is immaterial who affixes the stamps, so long as they are affixed.
Dale ads. Adams, p. 165.

Failure to write the initials of the person cancelling the stamp does not affect the admissibility of the instrument.
Foster v. Holley's Administrators, p. 224.

Failure to cancel the stamp does not render the instrument void.
Dale ads. Adams, p. 165.

(D) Instruments and Transactions Taxable

(1) Bonds and Certificates of Indebtedness

Bonds taken by a city in the exercise of a strictly governmental junction are exempt from taxation.
Ambrosini v. United States, p. 69.

No additional tax is required upon the issuance of a permanent or definite bond in substitution for a temporary bond which has been delivered.
Chile Copper Co. v. Edwards, Collector, p. 138.

The Revenue Act of 1918 imposes a tax not only on bonds, debentures, or certificates of indebtedness, but also upon everything known generally as corporate certificates, and therefore, so-called ''car trust certificates'' are taxable although they do not literally come within the specific forms of securities named.
Fidelity Trust Co. v. Lederer, pp. 894 and 208.

A bond filed to qualify as a state officer is not subject to Federal stamp tax.
Bettman, Collector, v. Warwick, p. 90.

(2) Stock Issue and Transfer

Certificates of interest in a Massachusetts trust are subject to tax under an act imposing a tax on certificates of stock issued by any ''association, company, or corporation.''
Malley, Collector, v. Bowditch et al., p. 327.

The exchange of original certificates of one kind of stock for original certificates of two other kinds of stock, the tax on all of which had been previously paid, does not involve an issue of ''original'' stock for which the corporation must pay a stamp tax.
Edwards, Collector, v. Wabash Ry. Co., p. 193.

A resolution of a board of directors of a corporation authorizing the issuance of stock of another corporation direct to its stockholders in exchange for a transfer of its assets is a transfer requiring payment of a stamp tax.
Marconi Wireless Telegraph Co. v. Duffy, Collector, p. 330.

(3) Sales on Exchange or Board of Trade

Sales on exchange or board of trade, for future delivery, are subject to stamp tax.
Nicol v. Ames, p. 371.

Sales at stock yards are subject to stamp tax.
Nicol v. Ames, p. 371.

A ''call'' issued by a stock broker is subject to tax as an agreement to sell.
Treat v. White, p. 509.

It is the obligation of every seller, in every sale of goods upon an exchange for future delivery, to make a memorandum of the sale.
Nicol v. Ames, p. 371.

Each sale or agreement to sell any grain at a board of trade is taxable, though during the day several separate sales are made of the same lot of grain and at the close of the day the only memorandum made shows the transfer from the original seller to the last buyer.
Calkins v. Smietanka, Collector, p. 119.

So-called "offers" to sell grain at a board of trade, made subject to deferred acceptance, held taxable on the basis of the total price for which the seller agreed to sell and not on the basis of what the broker was to receive as commission.
Calkins v. Smietanka, Collector, p. 119.

(4) Conveyance of Realty

It is not unconstitutional to tax masters' and referees' deeds under a Federal act.
Home Title Ins. Co. v. Keith, p. 263.

A master's deed made pursuant to order of court is subject to tax.
Crawford v. New South Farm & Home Co., p. 160.
Farmers' Loan & Trust Co. v. Council Bluffs G. & E. L. Co., p. 206.

MISCELLANEOUS WAR TAXES

(A) Transportation and Messages

Demurrage charges for failure to load and unload cars within the "free time" allowed by rules of railroad companies should be included as part of the tax of transportation and thereby subject to the transportation tax.
The Proctor & Gamble Co. v. United States, p. 964.

Telegraph messages transmitted by telegraph company for a railroad company pursuant to a contract for the mutual exchange of services free of charge are subject to the tax imposed under the Act of 1918.
Western Union Telegraph Company v. Delaware, Lackawanna, etc., Railroad Company, p. 1008.

(B) Sales Tax

Under an Act levying a tax on goods "sold or removed for sale," a removal for the purpose of forwarding a sale is a removal for sale within the meaning of the act.
United States v. American Chicle Co., p. 523.

An Act imposing a tax on the sale of automobile trucks by manufacturers cannot be construed to permit a tax to be imposed on the sale of parts of trucks even though it appears that such trucks are never sold as units by manufacturers.
Rech-Markaber Co. v. Lederer, Collector, p. 424.

Sweet chocolate sold in parcels of such sizes and shapes that it is commonly purchased and considered as candy by the public is taxable as candy, but sweet chocolate sold in large purchases not as candy but intended for further manufacturing purposes is not taxable as candy.
Malley, Collector, v. Walter Baker & Co., p. 931.

The ouija board is a "game" within the meaning of the Act of 1918.
Baltimore Talking Board Co. v. Miles, Collector, p. 845.

The place of payment of an excise tax may depend on the place of sale.
De Bary et al. v. Dunne, p. 173.

(C) Occupations Tax

The word "broker" in the Revenue Act of 1918, requiring brokers to pay a special tax, includes tobacco warehousemen who sell tobacco without bringing the buyer and seller together.
Cochran & Connally v. United States, p. 869.

(D) Child Labor Tax

For cases dealing with validity of Child Labor Tax Act, approved February 24, 1919, see:
The Atherton Mills v. Johnson, p. 840.
Bailey, Collector v. The Drexel Furniture Co., p. 841.
Bailey, Collector v. George, p. 843.

(E) Munitions Tax

For cases dealing with the question of what constitutes "manufacturing * * * shells" within the meaning of the Act, see
Forged Steel Wheel Co. v. Lewellyn, Collector, p. 223.
Carbon Steel Co. v. Lewellyn, Collector, p. 125.
Dayton Brass Castings Co. v. Gilligan, pp. 168 and 874.

Ammunition belts for machine guns are included within the words "parts" or "appendages" of machine guns used in the statute.
Mills Woven Cartridge Belt Company v. Malley, p. 948.

A company moulding brass ingots into small castings for fuses is subject to the War Munitions Tax even though the material was furnished by another company for whom the work was done, the delivery of the castings being a "disposition" of the same within the meaning of the Act.
Dayton Brass Castings Co. v. Gilligan, Collector, p. 874.

Amounts paid by a corporation, engaged in manufacturing shells, to an individual under a contract by which the latter was to share in the profits of such business, are not expenses of manufacture deductible by the corporation from the gross amount received from sales, in ascertaining taxable net profits.
Traylor Engineering & Mfg. Co. v. Lederer, Collector, p. 507.

The payment of a tax by the subcontractor on his profits does not relieve the main contractor from a tax on his profits.
Carbon Steel Co. v. Lewellyn, Collector, p. 125.

ADMINISTRATION AND PROCEDURE

(A) Collection of Taxes

(1) Assessment

The Commissioner need not require a return. He may make an assessment upon information derived from any source.
Anderson v. Farmers' Loan & Trust Co., p. 72.

The Commissioner may make an additional assessment under a statute permitting such procedure where a "false" return has been filed, even though the return was not fraudulent, but merely incorrect.
Elliott Nat'l Bank v. Gill, p. 199.

Taxes past due are a debt, without assessment.
King v. United States, p. 286.

While a tax is not, before determination, a debt in the strict sense of the term, it is in the broader meaning of the word.
United States v. General Inspection & Loading Co., p. 540.

Interest prescribed by statute at 1% per month is a debt.
United States v. Guest, p. 543.

Penalties cannot be assessed by a collector without giving the person charged his day in court.
Middleton v. Mee, Collector, p. 940.

(2) Summary Proceedings

Sale of property by distraint for collection of a penalty assessed without a hearing is not due process.
Kausch v. Moore, Collector, p. 280.

Penalties and forfeitures are collectible by suit and not by distraint proceedings.
Fontenot, Collector, v. Accardo, p. 895; same case below, p. 222.
Ledbetter v. Bailey, Collector, p. 919.

Sale of real or personal property on distraint before suit for taxes does not deprive owner of property without due process.
Springer v. United States, p. 458.

A collector is not guilty of trespass when he acts upon a writ, process, or warrant, fair on its face.
Glasgow v. Rowse, p. 230.

Provisions to compel, in suits other than criminal, the production of books, papers, etc., to prove any allegations made by the United States, are unconstitutional when applied to a suit based upon an alleged fraud under the revenue laws, since they in effect compel the defendant to testify against himself.
Boyd v. United States, p. 104.

If any person refuses to make a return he may be interrogated by the collector.
Fontenot ads. Accardo, p. 222; same case on appeal, p. 895.

The revenue act may authorize Internal Revenue Agents to examine private books and papers.
Perry v. Newsome, p. 402.

(3) Civil Actions

An action at law lies for the collection of taxes even though the taxing statute does not specifically provide such remedy.
United States v. Chamberlain, p. 529.
United States v. Tilden, p. 576.
United States v. Nashville C. & St. L. Ry. Co., p. 553.

The filing of returns and the payment of the taxes assessed thereon do not prevent suit for additional taxes for the period covered by the returns.
United States v. Tilden, p. 576.

Suit lies for tax under Revenue Act of August 5, 1909, without assessment. The action of debt lies for the recovery of a tax, either when it is a sum certain, or when readily reducible to certainty.
United States v. Grand Rapids & S. Ry. Co., p. 541.
United States v. Minneapolis Threshing Machine Co., p. 552.
United States v. Nashville, C. & St. L. Ry. Co., p. 553.
United States v. Waddell Investment Co., p. 1001.

Negligence or laches of government officers or agents constitutes no bar to an action by the government.

United States v. Guest, p. 543.

A suit in equity is proper to reach assets wrongfully distributed by directors of a corporation to themselves, as dividends, to evade taxes.

United States v. Capital City Dairy Co., p. 528.

Persons to whom corporate assets have been distributed without consideration, as stockholders in case of dissolution, are liable for corporate tax under the trust fund doctrine, to the extent of the distribution.

United States v. McHatton et al., p. 550.

The government does not need a judgment to follow assets of a corporation in the hands of stockholders, in case of fraudulent evasion of taxes.

United States v. Capital City Dairy Co., p. 528.

A judgment rendered under a penal statute in favor of the United States cannot be enforced against the heirs of the criminal.

United States v. Theurer, p. 575.

Negligence or laches of government officers or agents in permitting assets seized by collector to be abstracted from warehouse, constitutes no bar to government action on bond.

United States v. Guest, p. 543.

(4) Lien for Taxes

The claim of the United States arising out of income taxes and penalties due has priority over claims for state and county taxes.

United States v. San Juan County et al., p. 999.

The government lien for taxes is superior to the rights of subsequent encumbrancers or purchasers without knowledge.

United States v. Curry, p. 534.
United States v. Turner et al., p. 577.

But see

Mansfield v. Excelsior Refining Co., p. 329.

The lien of the government for taxes attaches on all property after the requirements of assessment and demand have been complied with.

United States v. Curry, p. 534.
United States v. Pacific Railroad, p. 560.

Demand implies previous ascertainment of the sum due, and this ascertainment is by means of the return or assessment.

United States v. Pacific Railroad, p. 560.

The lien of the federal government for taxes attaches, notwithstanding failure to comply with a state recording statute.

United States v. Snyder, p. 574.

Personal property need not be sold before resorting to real estate for satisfaction of tax liability.

United States v. Curry, p. 534.

A sale by a collector on lien for taxes carries only the taxpayer's interest and not that of the owner in fee or prior lien holder, even though the government holds a waiver executed by such third persons, expressly stipulating that the lien of the United States for taxes shall have priority over their interests in premises occupied by taxpayer.

Mansfield v. Excelsior Refining Co., p. 329.

The remedies of distraint and action in equity against land for the collection of tax are cumulative.

United States v. Blacklock, p. 527.

(5) Suits to Enjoin Collection

The collection of an internal revenue tax cannot be enjoined by suit against the collector, because of the prohibition of Sec. 3224, Revised Statutes.

Dodge v. Osborn, p. 182.
Kausch v. Moore, p. 280.
Ketterer, v. Lederer, p. 283.
Magee v. Denton et al., p. 325.
Pullman's Palace Car Co. v. Allen, p. 418.
Violette v. Walsh, p. 589.
Willmann et al., Trustees, v. Walsh, p. 609.

See also

Nye Jenks & Co. v. Town of Washburn et al., p. 379.

Nor can this be done indirectly, by a suit of a stockholder against a corporation.

Straus v. Abrast Realty Co., p. 496.

Nor indirectly, by suit to have sale of taxpayers' property by collector declared void.

Gouge v. Hart, Collector, p. 236.

But, a trustee was enjoined from voluntarily complying with an order of the Bureau of Internal Revenue to pay additional tax.

Weeks v. Sibley, p. 597.

And, upon averment of unconstitutionality, a stockholder may enjoin the corporation, notwithstanding the prohibition of the statute.

Brushaber v. Union Pacific R. R. Co., p. 107.

The inhibition of Sec. 3224 R. S. applies to all assessments and collections of internal revenue taxes made or attempted to be made under color of office by internal revenue officers charged with general jurisdiction over the assessment and collection of such taxes, and if, the Commissioner, in assessing a tax, or the collector, in collecting it, acts under color of his office, no suit to restrain the assessment or collection of the tax can be maintained.

Nichols, Collector, v. Gaston, et al., Executors, p. 949.
Page, Collector, v. Polk, p. 951.

A collector, proceeding to collect by distraint an assessment of Federal estate tax, before the expiration of the time for payment allowed by the statute, is acting under color of authority.

Nichols, Collector, v. Gaston, et al., Executors, p. 949.
Page, Collector, v. Polk, p. 951.

Sec. 3224 R. S. does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable.

Hill v. Wallace, Secretary of Agriculture, et al., p. 905.
Bailey, Collector, v. George, p. 843.

But the averment in a bill that a taxing statute is unconstitutional is not sufficient to take the case out of the prohibition of the statute.

Bailey, Collector, v. George, p. 843.

An injunction will be granted in a case where the taxpayer, if forced to pay the tax by distraint, would have no recourse at law due to the fact that the statutory period allowed for the filing of a claim for refund has expired.

Du Pont v. Graham, Collector, p. 882.

If it clearly appears that the action of the collector is a nullity or that the property about to be seized is not liable for the assessment, an injunction lies to restrain collection.
Markle v. Kirkendall, Collector, p. 331.

Receivers of a federal court, upon their own application for instructions, were ordered not to pay any income tax.
Western Pacific R. Co. v. Scott, p. 602.

However, on an application of trustees for instructions, a state court refused to assume jurisdiction of federal tax questions raised.
In re Application of Willmann et al., Trustees, p. 611.

The court will pass upon the merits of a supplemental bill to recover the tax after payment, even though the original bill was brought to enjoin the collection of the tax, where it is clear that the taxpayer could not recover even if the action were rightfully brought.
Dodge v. Brady, p. 180.

Sec. 3224, R. S., does not prevent the granting of an injunction to restrain collection of a penalty by distraint.
Lipke v. Lederer, Collector, p. 924.
Fontenot, Collector, v. Accardo, p. 895.
Kelly v. Lewellyn, Collector, p. 914.
Ledbetter v. Bailey, Collector, p. 919.
Middleton v. Mee, Collector, p. 940.
Thome v. Lynch, Collector, p. 986.
Contra: Kohlhammer v. Smietanka, p. 293.
Pummilli v. Riordan, Collector, p. 966.
Regal Drug Corp. v. Wardell, p. 426.
Violette v. Walsh, p. 589.
But all lawful taxes due must first be paid or tendered.
Kausch v. Moore, Collector, p. 280.
Fontenot, Collector, v. Accardo, pp. 222 and 895.
Kelly v. Lewellyn, Collector, p. 913.

A federal trial court should not make a finding that an exaction called by Congress a tax is in fact a penalty, the enforcement of which may be enjoined under appropriate circumstances, but the duty of making such a finding of facts should be left to a court of final jurisdiction.
Wassel v. Lederer, Collector, p. 1006.

A so-called tax which lacks all the ordinary characteristics of a tax, whose primary function is to provide for the support of a government, and clearly involves the idea of punishment for infraction of the law, is a penalty and must be so regarded in spite of the use of the word "tax."
Lipke v. Lederer, Collector, p. 924.

A taxpayer may maintain a suit for an injunction to restrain a state officer from selling his property under an illegal tax.
Purnell v. Page, Sheriff, p. 419.

(6) Limitations

The Statute of Limitations does not run against the government in collecting a debt.
United States v. Guest, p. 543.

The limitation in the act of August 5, 1909, applies to statutory summary proceedings for the collection of tax but not to a suit by the government.

United States v. Grand Rapids & I. Ry. Co., p. 541.
United States v. Minneapolis Threshing Machine Co., p. 552.
United States v. Nashville, C. & St. L. Ry., p. 553.

The discovery and assessment of an additional tax in cases of refusal or neglect to make a return and in cases or false or fraudulent returns, under the Act of October 3, 1913, must be made within three years from the time when the return is due.

Dupont v. Graham, Collector, p. 882.

(7) Compromise

A compromise of a criminal proceeding bars a civil suit upon a bond, based upon the same offense.

United States v. Chouteau, p. 531.

A compromise bars criminal prosecution.

Rau v. United States, p. 422.

Acceptance not only of tax but also of penalty and statement by collector or a deputy collector that such payment would end matter after admission of guilt, was a "compromise."

Rau v. United States, p. 422.
Willingham v. United States, p. 608.

(8) Application of Payments

The collector has no authority to apply to one item money deposited expressly to apply to another.

Boughton v. United States, p. 103.

The action of the Commissioner in applying an overpayment of tax against another tax alleged to be due held to be unauthorized and arbitrary.

Vaughan et al., Executors v. Riordan, Collector, p. 1002.

(B) Abatement and Refund

(1) Review of Administrative Action

A writ of certiorari will not issue to review the action of an executive officer of the United States, as it is not judicial. The remedy lies in starting a suit.

Degge v. Hitchcock, Postmaster General, p. 176.
First National Bank of Greencastle v. United States, p. 212.

Given a claim where the Commissioner has jurisdiction, his decision on the merits thereof, in the absence of fraud or mistakes in mathematical calculation, is final and, therefore, not subject to revision by any other executive officers, such as accounting officers.

Dugan v. United States, p. 188.
United States v. Savings Bank, p. 570.
First National Bank of Greencastle v. United States, p. 212.
Woolner v. United States, p. 613.

The decision of the Commissioner in favor of the taxpayer, in the absence of fraud or mistake, is an award all sufficient for the foundation of a judgment.

Edison Elec., etc., Co., v. United States, p. 192.
United States v. Kaufman, p. 547.
Woolner v. United States, p. 613.
Sybrandt et al. v. United States, p. 498.

In the absence of fraud or illegality, the Commissioner's decision as to whether or not the claim reached his office in due time is conclusive on the court.

First National Bank of Greencastle v. United States, p. 212.

Inasmuch as the processes of the Treasury Department are all ex parte, the Commissioner's decision allowing refund is not finally consummated beyond recall by him until a check has been issued upon a warrant duly signed by the Secretary of the Treasury.

Ridgway v. United States, p. 430.

Under Section 3220, Revised Statutes, requiring the Commissioner to transmit a case to the Secretary of the Treasury for his consideration and advisement, the Commissioner is not bound by the decision of the Secretary of the Treasury, which is only advisory under the statute.

Sybrandt et al. v. United States, p. 498.

It is not part of the duties of the Auditors (except the Sixth Auditor) to make decisions binding in any way upon anybody.

Ridgway v. United States, p. 430.

See also *supra*, the point, Collection of Taxes, (5) Suits to Enjoin Collection.

(2) Effect of Abatement

Abatement of tax and notice thereof cancels liability on abatement bond, and reimposition of tax does not revive bond.

United States v. Alexander et al., p. 520.

(3) Claim for Refund and Credit

The Commissioner has power to pay back all taxes erroneously or illegally collected.

Dugan v. United States, p. 188.

Claim for credit for overpayment of taxes was first permitted by the Revenue Act of 1918.

A. R. M. 46, p. 689.

A claim for credit has precisely the same effect as a claim for abatement, and by forbearance of the collector it may suspend collection until it is acted upon by the Commissioner.

A. R. M. 46, p. 689.

If a claim for credit is allowed, the collector and the taxpayer are relieved from further liability; if rejected, interest is to be paid on the amount suspended, from the time it was due.

A. R. M. 46, p. 689.

For limitations upon time for filing claim for refund, see under next point of this synopsis, (C) Suit to Recover Tax Paid, (3) Limitations.

(C) Suit to Recover Tax Paid

(1) Necessity for Involuntary Payment

No action lies for the recovery of a tax unless it was paid under protest or duress.

Chesebrough v. United States, p. 136.
Elliott v. Swartwout, p. 201.
Dugan, et al. v. Miles, Collector, p. 880.
Fox v. Edwards, p. 896.
The Proctor & Gamble Company v. United States, p. 964.
United States v. N. Y. & Cuba Mail S. S. Co., p. 555.
Vaughn, et al., Executors v. Riordan, Collector, p. 1002.

Merk v. Treat, Collector, p. 349.
Rock Island, Ark. & La. R. Co. v. United States, p. 436.
Union Pacific R. Co. v. Dodge, p. 516.

Statutes granting the right to sue for taxes paid under protest have no application to payments of penalties.
Lipke v. Lederer, Collector, p. 924.

While a tax illegally assessed and collected may be recovered back by suit, it is not contemplated by any provision of law that one who is forced to pay any illegal penalty can recover it back by suit.
Fontenot, Collector v. Accardo, p. 895; same case below, p. 222.

A suit will lie to recover a penalty assessed and collected without warrant of law.
Schafer v. Craft, Collector, p. 973.

The penalty of 1% paid under protest on an illegal assessment may be recovered.
Camp Bird, Ltd., v. Howbert, Collector, p. 123.

Under the Revenue Act of 1918 the taxpayer has a right to the refund of taxes wrongfully collected, without proof of duress or protest, in spite of Revised Statutes, Section 3228.
Greenport Basin & Con. Co. v. United States, p. 242.

Objection by claim for abatement when computation made, without protest at time of payment, is sufficient protest.
Greenport Basin & Con. Co. v. United States, p. 242.

Oral protest noted by the collector on the receipt, when the parties understood that if the tax was not paid the law would be enforced, shows payment under duress.
Shaefer v. Ketchum, p. 447.

Payment was held to be involuntary where, after oral protest, the collector threatened the enforcement of the penalties of fine and imprisonment and the tax was then paid with a written protest.
Home T. & T. Co. v. City of Los Angeles, p. 262.

Payment of tax under protest upon demand of collector, coupled with threat that unless promptly paid, the same would be collected with penalty and interest, constitutes such duress as clearly makes the payment involuntary.
Herold, Collector, v. Kahn et al., p. 257.

When taxes are paid under protest that they are being illegally exacted, or with notice that the taxpayer contends that they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for a suit has been established.
Herold, Collector, v. Kahn et al., p. 257.

Payment of tax after written protest, signed by the taxpayer, with statement of definite grounds of objection to tax demanded and paid, is sufficient protest.
Nichols v. United States, p. 371.

Affixing of revenue stamps under Act of June 13, 1898, after written protest stating grounds and that stamps were being affixed under duress, is sufficient to sustain recovery.
Merk v. Treat, Collector, p. 349.

Payment of a tax by one not subject to the tax by the statute is voluntary even though the formalities of protest are gone through.

Gaar, Scott & Co. v. Shannon, p. 226.

Payment of stamp tax on goods sold unstamped, even though under written protest made after the goods were sold, is voluntary as there was no duress of goods.

Merk v. Treat, Collector, p. 349.

Affixing of revenue stamps to a manifest to obtain clearance for a vessel, without presenting any claim of protest to collector of internal revenue or to collector of port, is voluntary.

United States v. New York & Cuba Mail S. S. Co., p. 555.

Written protest at the time of payment of tax is inadequate to make payment involuntary.

Union Pacific R. Co. v. Dodge, p. 516.

The mere fact that a taxpayer for a long time refused to make a return and afterward brought a suit to recover the tax after it was finally paid without protest, does not warrant the assumption that such refusal was based upon illegality of the tax.

Beer et al. v. Moffatt, Collector, p. 88.

Where the commissioner retained an overpayment of tax, as shown by a federal estate tax return, applying it on a tax which he claimed the estate owed for a gift alleged to have been in contemplation of death, held that this action was unauthorized and arbitrary, and that the amount so retained and irregularly applied without consent, could not be considered as a voluntary payment on the tax alleged to be due.

Vaughn et al., Executors v. Riordan, Collector, p. 1002.

Even though an assessment is void, a taxpayer, paying the same under protest, is not entitled to recovery in an action against the collector, if it appears that the tax was justly due from him, there being no implied promise for its return.

Penrose v. Skinner, Collector, p. 956.

A taxpayer cannot by suit recover any taxes once paid, which in fact were due, even though the exact manner of their collection was not authorized.

Schafer v. Craft, Collector, p. 973.

(2) Necessity for Appeal

Failure to appeal to the Commissioner of Internal Revenue, as required by statute, bars suits for recovery of taxes illegally assessed, in state courts as well as in Federal courts.

Collector v. Hubbard, p. 151.
Cheatham v. United States, p. 134.
Rock Island, etc., Co. v. United States, p. 436.
Kings County Savings Inst. v. Blair, Collector, p. 286.

A failure to file claim for refund is no bar to a suit where, after rejection of a claim for abatement, the taxpayer was advised by the Commissioner that he need not file a claim for refund.

Black v. Bolen, Collector, p. 95.

Where upon appeal the first assessment is set aside and a new assessment made, appeal must be taken from the last assessment before recovery will be allowed.

Cheatham v. United States, p. 134.

Appeal must be made after payment of the tax, by claim for refund.
Rock Island, etc., R. Co. v. United States, p. 436.
Savings Institution v. Blair, p. 443.

Where appeal to Commissioner is taken before payment of tax, appeal after payment is unnecessary.
Loomis, Collector v. Wattles, p. 313.
DeBary et al. v. Dunne, Collector, p. 173.
Weaver, Collector v. Ewers, p. 1007.

The fact that the filing of a claim by a taxpayer, suing to recover an amount of tax alleged to have been erroneously paid, would have been a useless ceremony cannot justify his failure to file such claim.
Rand v. United States, p. 966.

Claims for refund of a legacy tax made on behalf of the trustee of an estate and the personal representative of the deceased can not be ascribed to the legatee so as to support an action by such legatee against the United States for recovery of the tax.
Rand v. United States, p. 966.

Where a taxpayer requested a ruling of the Commissioner as to the taxability of certain transfers and apparently acquiesced in the ruling handed down, a claim for refund of the taxes paid, filed after the running of the statute of limitations, cannot be treated as an amendment of a claim previously filed so as to avoid the bar of the statute.
Baltimore & Ohio Railroad Co. v. United States, p. 843.

Protest endorsed on checks and making of prescribed amended returns with protest and claim written thereon, are not adequate presentation of claim for refund.
Savings Institution v. Blair, p. 443.

Evidence showing an appeal to be endorsed ''examined and rejected'' with signature of a person unknown to the court, is insufficient to establish appeal to Commissioner and decision by him.
Laurer v. United States, p. 303.

Appearance by the collector does not waive statutory requirements of appeal to the Commissioner.
DeBary et al. v. Dunne, Collector, p. 173.

The effect of filing a claim for refund of a tax is not extinguished by a judgment in a suit against a collector and so, a suit against the United States may subsequently be instituted without the filing of a new claim.
Sage et al., Executors v. United States, p. 971.

(3) Limitations

When the United States gives consent to the issuance of process against it, provided the process issue within a limited time, this limitation is strictly a condition of the remedy given, and not a statute of limitations in bar of the action; whereas statutes limiting the time of bringing the common law right of action against tax collectors are strictly and technically statutes of limitations.
Mill Creek & Minehill Nav. & R. Co. v. United States, p. 943.

In a suit against the United States in the Court of Claims, the filing of the petition determines the question of whether the proceedings has been begun in time, but if the action be brought in the District Court by writ of summons, the question is to be determined by the date of the writ.
Mill Creek & Minehill Nav. & R. Co. v. United States, p. 943.

The Revenue Act of 1916, permitting a taxpayer to file a claim for refund of taxes collected under the 1909 and 1913 Acts notwithstanding R. S. Sec. 3228, which requires a claim for refund to be made within two years, permits a suit to recover taxes unlawfully collected where the claim for refund made thereunder was erroneously rejected; the cause of action for such taxes accrues at the time of such rejection within R. S. Sec. 3227, requiring suit to be brought within two years after the cause of action accrues.

Public Service Corporation v. Herold, p. 965; reversing case below, p. 415.

The cause of action for filing a claim for refund accrues when the tax is paid.

Wright v. Blakeslee, p. 614.

A claim for refund of taxes must be presented within two years after they were paid.

New York Mail & Newspaper Trans. Co. v. Anderson, p. 364.
Public Service Ry. Co. v. Herold, p. 414.

The lodging of an appeal with the collector was a legal presentation to the Commissioner within the prescribed time.

United States v. Savings Bank, p. 570.

Where the Commissioner delays decision beyond the time fixed in the statute, the claimant has an option to treat the delay as denial and sue pending appeal, or wait until decision and then sue within the statutory period thereafter.

Arnson v. Murphy, Collector, p. 77.
James, Admr., v. Hicks, p. 275.

The cause of action, in a suit against a collector, first accrues when the Commissioner renders a decision on the claim for refund.

Wright v. Blakeslee, p. 614.
State Line & S. R. Co. v. Davis, p. 485.
Arnson v. Murphy, Collector, p. 77.

Although no decision was rendered by the Commissioner on appeal, yet the statute was held to have run.

Christie-Street Com. Co. v. United States, p. 141.

The last appeal is treated as the basis for determining the time within which plaintiff must bring suit.

James, Admr., v. Hicks, p. 275.

The United States having given, by the Revenue Act of 1916, statutory authority to bring suit, where without such authority suit would have been barred by the statute of limitation, it thereby signified that it did not stand on any previous litigation between it and the taxpayer to create the defense of res adjudicata.

Public Service Corporation v. Herold, p. 965.

A state statute of limitations cannot bar an action to recover federal taxes.

Arnson v. Murphy, Collector, p. 77.

(4) Jurisdictional Amount

A suit arising under the revenue laws is a suit under a statute and, therefore, the amount in dispute need not exceed $2,000 in order for the Circuit Court of the United States to have jurisdiction.

Ames v. Hogan, p. 71.

(5) Retroactive Legislation

An act prescribing additional procedure for the recovery of taxes cannot have a retroactive effect, as the right is vested.
Hubbard v. Brainard, p. 266.

(6) Counter-Claim

In a suit for the recovery of money deposited for a special object, collector may set up as a counter-claim any taxes due.
Boughton v. United States, p. 103.

Where taxpapers recover a judgment against the collector because they were taxed as an association when they should have been taxed as trustees, the collector will be required to pay back only the excess of the amount paid, over the amount properly payable as trustees.
Crocker et al., Trustees v. Malley, Collector, p. 161.

(7) Parties

A suit against the collector is not against the United States.
Conant v. Kinney, p. 159.

A judgment of a district court in a suit against the collector is not a judgment against or in favor of the United States, since the suit is a personal one, and so such a judgment is not a bar to a subsequent action against the United States.
Sage et al., Executors v. United States, p. 971.

Jurisdiction is given to the District Courts to determine the justness of claims against United States and for all purposes of procedure the United States is to be regarded as is any other defendant, and may be brought in by summons served on the district attorney.
Mill Creek & Minehill Nav. & R. Co. v. United States, p. 943.

Where claim for refund is disallowed, an action lies against the collector.
Edison Elec., etc., Co. v. United States, p. 192.

But not against his successor in office.
Detroit Hotel Co. v. Brady, Collector, p. 878.
Roberts v. Lowe, Collector, p. 434.
Cincinnati G. & E. Co. v. Gilligan, Collector, p. 142.
Smietanka, Collector v. Indiana Steel Co., p. 980.

A collector who had not part in the collection or disbursement of a tax assessed and collected by his predecessor in office may not be brought in as a party to a suit begun while the latter was still in office to recover back the amount of the tax as having been unlawfully collected.
Union Trust Company v. Wardell, Collector, p. 990.

Suit against collector does not abate by reason of his death or expiration of his term of office.
Phila. H. & P. R. Co. v. Lederer, Collector, p. 405.

The general provision in the Act of February 8, 1919, to the effect that a suit by or against an officer of the United States in his official capacity shall not abate by reason of his death, etc., supposes a suit begun against an officer in his lifetime.
Smietanka, Collector v. Indiana Steel Co., p. 980.

When taxes are paid under protest, collector is personally responsible.
Elliott v. Swartwout, p. 201.
Atchison, T. & S. F. Ry. Co. v. O'Connor, p. 81.

The collector cannot exonerate himself from personal responsibility for a tax paid under protest by paying the tax over to his principal.

Elliott v. Swartwout, p. 201.

Where a claim for refund is allowed and payment is refused for any reason, suit may be brought directly against the United States in the Court of Claims.

Edison Elec., etc., Co. v. United States, p. 192.
United States v. Kaufman, p. 547.

Suit to recover taxes exacted under a misconstruction of the revenue law may be brought directly against the United States whether or not the claim has received the approval of the Commissioner and whether the action be in tort or in contract.

Christie-Street Com. Co. v. United States, p. 141.

The government is a necessary party in a suit affecting its interests, such as an action to set aside a sale made by a collector.

Gouge v. Hart, Collector, p. 236.

In a suit to subject property to the payment of tax, the taxpayer and all who might have acquired interests in the property are necessary parties defendant.

United States v. Curry, p. 534.

A lessee paying the tax of his lessor under protest, to prevent a distraint on the property leased, may sue to recover same, even though there is no privity between him and the collector.

Cambria Steel Co. v. McCoach, Collector, p. 121.

(D) Rules of Practice and Procedure

(1) Pleading and Procedure

A declaration which does not allege that the tax sought to be recovered was paid under protest or duress is subject to demurrer.

Dugan et al. v. Miles, Collector, p. 880.
The Proctor & Gamble Company v. United States, p. 964.

Even though a count in a declaration makes claim for recovery of a larger amount of tax than the plaintiff is entitled to recover, it is not bad if it discloses on its face a legal right to a judgment for something.

Dugan et al. v. Miles, Collector, p. 880.

Since the Judicial Code (Act of March 3, 1911), granting jurisdiction to District Courts concurrently with the Court of Claims on suits against the United States with some exceptions, prescribes no special method of procedure, the District Courts may follow their established practice, or may adopt that established for the guidance of the Court of Claims.

Mill Creek & Minehill, Nav. & R. Co. v. United States, p. 943.

(2) Burden of Proof

In a suit by the government to recover taxes, the burden of proof is upon the government.

Little Miami, etc., R. R. Co. v. United States, p. 312.

The plaintiff has the burden of making out his case in a suit to recover an exacted tax payment.

Cadwalader v. Lederer, p. 617; affirmed, p. 920.
Cohen v. Lowe, p. 147.
Germantown Trust Co. v. Lederer, p. 229.
Lincoln Chemical Co. v. Edwards, p. 310.

In a suit to recover taxes illegally collected, the burden of showing a previous payment rests on the plaintiff.
Hurst v. Lederer, Collector, p. 910.

The burden of showing fraud or mistake in the Commissioner's award in favor of a taxpayer is on the government.
Edison Elec., etc., Co. v. United States, p. 192.

(3) Sufficiency of Evidence

The assessment by the Commissioner is presumed at the trial to make a prima facie case. This prima facie case may be overcome by adequate evidence, in which event the collector thereafter has the burden of going forward with the evidence.
Bernheim Distilling Co. v. Mayes, p. 89.
Mayes, Collector v. United States Trust Co., p. 935.

Where a tax is levied on one theory, the court will not permit a change to a new theory in order to sustain the tax.
Loomis, Collector, v. Wattles, p. 313.

To recover it is not sufficient to show merely that the Commissioner proceeded without proper evidence, or otherwise erroneously, but the taxpayer must show that the tax collected or some part of it was not due.
Anderson v. Farmers' Loan & Trust Co., p. 72.

Evidence showing an appeal to be endorsed "examined and rejected" with the signature of a person unknown to the court is insufficient to establish an appeal to Commissioner of Internal Revenue and a decision by the Commissioner.
Laurer v. United States, p. 303.

Where the statute requires that records be kept, the books of the taxpayer constitute the best evidence in the case and until it is shown that they cannot be produced, or do not contain the information required, no evidence of the facts required to be recorded is admissible.
Bergdoll v. Pollock, p. 850.

(4) Costs and Interest

Costs should be allowed a taxpayer in a suit against a collector, if successful.
DeBary v. Carter, p. 172.
Treat, Collector v. Farmers' Loan & Trust Co., p. 508.

The United States is entitled to interest on the amount of tax due, unless forbidden by statute.
Billings v. United States, p. 92.

Where a tax is recoverable by the taxpayer, interest thereon is properly included in the judgment if the action is against the collector.
Conant v. Kinney, p. 159.
Boston P. R. Corporation et al. v. Gill, p. 118.
Klock Produce Co. v. Hartson, p. 288.
New York Mail & Newspaper Trans. Co. v. Anderson, p. 364.
Park v. Gilligan, p. 393.
State Line & S. R. Co. v. Davis, p. 485.
Treat v. Farmers' Loan & Trust Co., p. 508.

But no interest is recoverable if the action is against the United States.
United States ex rel. Angarica v. Bayard, p. 524.

A suit against the collector is not against the United States.
Conant v. Kinney, p. 159.

Where taxes were originally paid without protest, no appeal was taken to the Commissioner, and no demand made for repayment, interest cannot be recovered.
Commissioner v. Buchner, p. 153.

Delay in prosecution of a case at the suggestion of the collector is no defense to the allowance of interest.
Boston & P. R. Corporation et al. v. Gill, Collector, p. 118.

Acceptance, without objection, of the sum which the government illegally exacted bars recovery of interest.
Stewart v. Barnes, Collector, p. 490.

(5) Appeal and Error

The contention that a fund taxed as income was not income within the scope of the Sixteenth Amendment is sufficient to sustain a writ of error.
Merchants Loan & Trust Co. v. Smietanka, p. 345.
Towne v. Eisner, p. 500.

Where question is one of law and the case is to have an appellate experience, a new trial will not be granted by trial court.
Cadwalader v. Lederer, Collector, p. 617; affirmed, p. 920.

(E) Jurisdiction of Courts

A suit in equity by the executors of an estate against the collector individually and as collector to restrain him from collecting an estate tax is one involving a controversy arising under the laws of the United States and hence the federal court has jurisdiction thereof.
Nichols, collector, v. Gaston, et al., Executors, p. 949.

Where the United States refuses to state whether it will claim an income tax on a sum of money received by the receivers of a corporation before the due date of the tax, the court is without power to pass on the rights of the United States as to any moneys received during that year and asserted to be income by the taxing authorities, where such authorities refuse to consent to an adjudication.
Pennsylvania Cement Co. v. Bradley Contracting Co., p. 954.

Under the Bankruptcy Act, the bankruptcy court may pass upon the validity of the tax in the first instance where the Government has filed proof of claim against the bankrupt; the claim will not be ordered paid as a matter of course and the trustee left to his remedy by way of claim for refund.
In re General Film Corporation, p. 901.
In re Williams Oil Corporation, p. 1010.

The bankruptcy court has jurisdiction to proceed in invitum to liquidate an income tax and notice to the Collector of Internal Revenue for the district is sufficient as a condition precedent to such proceedings.
In re Anderson, p. 837.

If the powers to tax are exercised oppressively, the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.
Flint v. Stone-Tracy Co., p. 217.

The measurement of a corporation tax by net income or by invested capital is not beyond the power of Congress as arbitrary, for the selection of the measure and objects of taxation devolves upon Congress and not upon the courts, as long as the tax does not amount to confiscation.

Flint v. Stone-Tracy Co., p. 217.
La Belle Iron Works v. United States, p. 294.

Whether the amount of money on hand or the amount received during the year shall be taken as the measure of the property to be taxed is a legislative and not a judicial question.

In re Opinion of Justices, p. 383.

A state court has no jurisdiction to hear and determine the amount of taxes legally due the United States from a corporation.

In re Application of Willman, et al., p. 611.

As to the jurisdiction of courts to enjoin the collection of federal taxes, see the point above, (A) Collection of Taxes, (5) Suits to Enjoin Collection. See also, above, (B) Abatement and Refund, (1) Review of Administrative Action.

(F) Regulations by the Treasury Department

(1) Power to Make

To invest the Secretary of Treasury with authority to prescribe regulations not inconsistent with the law, for the conduct of the business of his department, is not inconsistent with the Constitution of the United States.

Brushaber v. U. P. Railroad Co., p. 107.
Boske v. Comingore, p. 98.

The Secretary of the Treasury has the power to regulate the mode of proceedings to carry into effect a revenue act which Congress has enacted.

Morrill v. Jones, p. 355.

(2) Effect of

Regulations of the Commissioner have no binding force if they alter, amend, or extend the statute.

Greenport Basin & Con. Co. v. U. S., p. 242.
Morrill v. Jones, p. 355.
Cartier et al. v. Doyle, p. 126.
De Laski & Throop C. W. Tire Co. v. Iredell, p. 177.
McNally v. Fields, p. 937.

Regulations issued by the Secretary of the Treasury with reference to internal revenue, and for the government of the officers of the revenue department, have the force and effect of law and are as binding as if incorporated in the statute law of the United States.

Stegall v. Thurman, p. 488.

While the Revenue Act authorizes generally the making of regulations by the Commissioner, he is not given authority by a regulation to nullify or in any way to interfere with statutory provisions respecting other matters.

In re Williams Oil Corporation, p. 1010.

Administrative rulings made by the Treasury Department after careful consideration of a problem as it effects the country as a whole ought not lightly to be disturbed by a court.

Western Union Telegraph Company v. The Delaware, Lackawanna, etc., Railroad Company, p. 1008.

The finding and practice of the administrative officers of the Government are presumed to be based on fair conclusions as the result of investigation required of them by the statute.

Baltimore Talking Board Co. v. Miles, Collector, p. 845.

While the presumption that the Department charged with the execution of a law has properly interpreted it may be strengthened in proportion to the time such construction has obtained, nevertheless a construction of a statute by the Department charged with the enforcement thereof should be given due consideration regardless of the length of time such construction has been adopted and enforced by that Department.

Dayton Bronze Bearing Co. v. Gilligan, p. 875.

No authority has been vested in the Commissioner to overrule and reverse the action of his predecessor in office, and where a Commissioner, acting under authority, hears and determines a question of fact necessary to enable him to act intelligently in determining the amount of a taxpayer's net income on which he will be required to levy an assessment, his finding on that issue, not having been impeached, should be regarded as final.

Penrose v. Skinner, Collector, p. 956.

But the decision of a Commissioner upon the income tax liability of a taxpayer based upon one question of fact does not preclude a succeeding Commissioner from reopening the case where other questions of fact have developed since the former decision.

Penrose v. Skinner, Collector, p. 956.

A regulation of the Treasury Department with respect to the taxability of telegraph messages transmitted under exchange of service agreements, cannot be attacked collaterally in a suit brought by a telegraph company against a railroad company to recover from the latter the amount of taxes on such messages paid by it to the Government on behalf of the latter.

Western Union Telegraph Company v. Delaware, Lackawanna, etc., Railroad Company, p. 1008.

The Secretary of the Treasury may issue regulations forbidding officers of the department to permit the use of records for any purpose not relating to the collection of revenues.

Boske v. Comingore, p. 98.

Where Congress has passed an act admitting, free of duty, animals imported for breeding purposes, a regulation by the Secretary of the Treasury that the animals must be of superior stock is not a regulation of the mode of proceedings to carry into effect an act Congress has passed, but is an amendment or alteration of the act.

Morrill v. Jones, p. 355.

A regulation prohibiting an officer of the revenue department to divulge any information in regard to his business applies even when he is called as a witness in a state court.

Stegall v. Thurman, p. 488.

A provision authorizing Internal Revenue Agents to examine private books and papers is not unconstitutional.

Perry v. Newsome, p. 402.

The rulings of the Commissioner of Internal Revenue, even though published in an Internal Revenue Record, are not constructions of such dignity that a re-enactment of the statute subsequent to such ruling is to be regarded as a legislative adoption of that construction.

Dollar Savings Bank v. U. S., p. 184.

(G) Interpretation of Statutes

A general intention on the part of Congress to tax all income cannot be enforced by the court unless carried into language which can be reasonably construed to effect it, since the provisions of such acts are not to be extended by implication.

Smietanka, Collector v. First Trust & Savings Bank, Trustee, p. 979.

In case of doubt a tax law should be construed in favor of the taxpayer.

Plant v. Walsh, Collector, p. 961.

But an exemption proviso in a general taxing statute should be strictly construed.

Commercial Health & Accident Co. v. Pickering, Collector, p. 863.

A subsequent act repeals, by implication, inconsistent laws.

Violette v. Walsh, Collector, p. 589.

Whenever successive acts of Congress are acts pari materia, or upon the same matter, they are to be construed as one continuing and continuous act.

United States v. Smith, p. 573.

The doctrine of ejusdem generis does not apply to contradict the intent of the statute read as a whole.

Commonwealth v. Werth, p. 158.

A proviso of an act which refers in general terms to something that has already been stated will be interpreted to refer only to the clause immediately preceding such proviso, when the meaning of the other clauses is well known and when it would have been superfluous to add to the other clauses the description contained in the proviso.

Herold, Collector, v. Park View Bldg. & Loan Ass'n, p. 259.

Laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared.

Shwab v. Doyle, Collector, p. 975.

While the rule is that statutes should be so construed as to prevent them from operating retroactively, such a rule does not authorize a judicial re-enactment by interpretation of a statute to save it from producing a retroactive effect.

Billings v. United States, p. 92.

An amendment to a tax law fixing a different rate will be interpreted to apply to the year in which the amendment was passed, if such is shown to be the intent of the legislature.

Smith v. Dirckx, p. 455.

A license tax upon all insurance companies, associations, and societies is not repealed by the general repealing clause in a later license tax act which requires a fee of all corporations doing business within the state.

Equitable Life Assurance Society v. Hart, p. 201.

The fact that judges' salaries were not expressly exempted by an act would not make the whole act unconstitutional but the act would be read as if such an exemption were written in the act.

Peacock & Co. et al. v. Pratt, p. 395.
Robinson v. Pratt, p. 434.

QUESTIONS OF CONSTITUTIONALITY

(A) Powers of Taxation

(1) Federal

While the federal government may do nothing by taxation in any form to prevent the full discharge by a state government of its governmental functions, yet whenever a state engages in a business which is of a private nature, such business is not withdrawn from the taxing power of the nation.
South Carolina v. United States, p. 984.

An Act of Congress imposing a duty of one hundred per centum of a tax as a penalty for a false return is constitutional.
Doll v. Evans, p. 879.

Congress has power to tax at the source income of nonresident aliens derived from sources within the United States.
United States v. Erie Railroad Company, p. 537.

The Federal Government has the power to tax domestic corporations upon their net income derived from selling goods in foreign states, and such tax is not a tax on exports.
Peck & Co. v. Lowe, p. 395.

Taxation of the Porto Rican income of a New York corporation does not violate the Organic Act of Porto Rico of 1917, which provides that all laws shall apply to Porto Rico except internal revenue laws.
Porto Rico Coal Co. v. Edwards, Collector, p. 410.

Congress does not have the power to tax the salaries of federal judges who are holding office when the act is passed.
Chief Justice Taney to Mr. Chase, p. 138.
Evans v. Gore, p. 203.

Congress has the power to require memoranda of sales for future deliveries for the purpose of taxing the sales.
Nicol v. Ames, p. 371.

Congress cannot, under the Constitution of the United States, impose a tax upon the salary of an officer of a state.
Collector v. Day, p. 149.
United States v. Ritchie, p. 569.
Freedman v. Sigel, Collector, p. 225.

An excise tax by the United States upon public service corporations organized for carrying on business of a private character is not invalid on the ground that it taxes a function of a state.
Flint v. Stone-Tracy Co., p. 217.

If a particular tax bears heavily upon a corporation or a class of corporations, it cannot, merely for that reason only, be pronounced contrary to the constitution as practically destroying the right of states to create corporations.
Flint v. Stone-Tracy Co., p. 217.

A federal estate tax is not unconstitutional on the ground that it is levied on rights created solely by state law and depending for their continued existence on the consent of the several states.
Knowlton v. Moore, p. 289.
New York Trust Co. v. Eisner, p. 370.

(2) State

A tax levied by a state upon the corporate franchise or business of a corporation, and computed by the extent of the dividends upon its capital stock, is not a tax upon the capital stock or property of the company and so no reduction need be made because of the fact that the company had invested part of its capital in United States bonds.

Home Insurance Company v. New York State, p. 909.

A state tax law is not unconstitutional because the tax is imposed upon income on a nonresident which is derived from property situated within the state.

Shaffer v. Howard, p. 444.
Shaffer v. Carter, p. 448.
Travis, Comptroller, v. Yale & Towne Mfg. Co., p. 505.

A state may validly compel non-residents to pay an income tax upon profit from business done in the state no greater in any respect than the tax imposed upon the conduct of such a business by a resident.

People ex. rel. Stafford v. Travis, p. 960.

A state may not legally levy a tax upon income received by a person for a year during which he was a nonresident of that state, when such person becomes a resident after the close of the taxable year.

Hart v. Tax Commissioner, p. 903.

A state cannot tax the interest on bonds made and payable out of the state and issued to and held by nonresidents of the state.

State Tax on Foreign-Held Bonds, p. 487.
Maguire v. Trefry, p. 326.

A state income tax act providing for the raising of money to give to soldiers who served in the army of the United States does not interfere with the exercise of the power to raise and support an army by the United States, and is for a public purpose of the state.

State ex rel. Atwood v. Johnson, p. 467.

(3) Territorial

A territory which by its organic act has the power to legislate upon all rightful subjects of legislation may pass an income tax law.

Peacock & Co. v. Pratt, p. 395.

(B) Requirements of Income Taxation

(1) Uniformity

(a) As Required by Federal Constitution

Uniformity as used in the Constitution of the United States means geographical uniformity throughout the United States.

Flint v. Stone-Tracy Co., p. 217.
La Belle Iron Works v. United States, p. 294.
Knowlton v. Moore, p. 289.

A graduated income tax is constitutional.

Brushaber v. U. P. Railroad Co., p. 107.
Tyee Realty Co. v. Anderson, p. 513.

A tax act is not unconstitutional because of inequality of operation owing to different local conditions.

Flint v. Stone-Tracy Co., p. 217.

The clause of the Constitution of the United States requiring taxes to be uniform throughout the United States is applicable only to the taxing power of the United States, and does not apply to the taxing power of a territory.

Peacock & Co. et al. v. Pratt, p. 395.
Lawrence v. Wardell, Collector, p. 304.

Provisions of an income tax act which allow different deductions for married people than for single, different deductions for husbands than for wives, and different deductions for individuals or partnerships than for corporations is not discriminatory.

Brushaber v. U. P. Railroad Co., p. 107.
Stanton v. Baltic Mining Co., p. 460.
Flint v. Stone-Tracy Co., p. 217.

An act taxing the use of foreign built yachts without also taxing the use of domestic yachts is not unconstitutional because of lack of uniformity.

Billings v. United States, p. 92.

Stamp tax on sales for future delivery is uniform in that it is upon all who avail themselves of the privileges or facilities offered at the exchanges.

Nicol v. Ames, p. 371.

(b) As Required in Various States

Where a state constitution has provided that taxes shall be uniform, the only uniformity required is uniformity within the class.

State ex rel. Atwood v. Johnson, p. 467.
Ludlow-Saylor Wire Co. v. Wollbrinck, p. 317.
State v. Pinder, p. 475.
Robertson v. Pratt, p. 434.
In re Opinion of the Justices, p. 382.

An income tax, being an excise, is not invalid as being in conflict with the provision of a state constitution that property shall be taxed in proportion to its value and shall be assessed for taxes under general rules and by uniform rules according to its true value.

Hattiesburg Grocery Co. v. Robertson, p. 904.

An income tax is not unconstitutional because it is graduated.

Wells ads. Alderman, p. 599.

A state income tax act is not unconstitutional because it taxes corporations differently than individuals, or a certain class of individuals differently than another class.

Ludlow-Saylor Wire Co. v. Wollbrinck, p. 317.
Glasgow v. Rowse, p. 230.

A state tax law is not invalid which taxes the stock of foreign corporations and does not tax the stock of domestic corporations.

Kidd v. Alabama, p. 283.
Darnell v. Indiana, p. 166.

A tax on dividends declared by a corporation to its stockholders is not invalid as lacking uniformity, since all dividends of all stockholders are reached.

State ex rel. Pfister v. Widule, p. 481.

A state statute providing that certain forms of property shall be assessed upon their market value and other forms of property upon a certain number of times their annual value is not valid under a state constitution empowering the general assembly to levy proportional taxes upon all inhabitants.

In re Opinion of Justices, p. 383.

A tax upon income derived by the inhabitants of a state from the stocks, bonds and mortgages issued by foreign corporations is a tax upon property and is invalid, under a state constitution requiring taxes on property to be levied proportionally upon all inhabitants, if it is not levied at the same rate as taxes on other property.

In re Opinion of Justices, p. 383.

To use the gross income of corporations as a basis for taxation of property while the amount of property was used as the basis for individuals is in violation of the constitution of a state requiring property of corporations to be taxed as nearly as may be as property of individuals.

Johnson v. Wells Fargo & Co., p. 279.

A city ordinance that taxes real estate and interest on bonds, notes, and other evidences of indebtedness, at a different rate than the gross earnings of banks is not void under the constitution of a state which declares that taxes shall be uniform on all species of property taxed.

Waring v. Savannah, p. 594.

(2) Validity of Exemptions

Specific exemptions of certain amounts are not repugnant to the due process clause of the Fifth Amendment.

Brushaber v. U. P. Railroad Co., p. 107.

It is within the power of the legislature to make a reasonable classification, and the failure to tax all incomes is not a constitutional objection.

In re Opinion of the Justices, p. 383.
State v. Pinder, p. 475.

Personal exemptions from taxation are valid as long as they are reasonable, and the amount is largely within the discretion of the legislature.

Peacock & Co. et al. v. Pratt, p. 395.
State v. Pinder, p. 475.
Robertson v. Pratt, p. 434.

Even if there is a right to exempt a certain class of property wholly from taxation, a partial exemption, conditional upon the property exempted contributing an arbitrary and disproportional percentage of its value, is not authorized.

In re Opinion of Justices, p. 383.

A provision permitting farmers to omit from their income return certain products of the farm which are used by them is valid.

Brushaber v. U. P. Railroad Co., p. 107.
Robertson v. Pratt, p. 434.

A state income tax act is not a violation of the provisions of a state constitution because it exempts income derived from sources other than the classes of property permitted to be exempt by the constitution.

Ludlow-Saylor Wire Co. v. Wollbrinck, p. 317.

A law is invalid, because violating a contract of the Government, which imposes a tax upon the income derived from property which by contract of the Government is exempt.

Oahu R. & L. Co. v. Pratt, p. 380.

A territorial income tax law which allows an exemption of two thousand dollars upon incomes under four thousand dollars violates the territorial constitution requiring each person to contribute his proportion to the expense of protecting his life, liberty and property.

Campbell v. Shaw, p. 122.

A city ordinance which exempts certain classes of property from taxation is not void under the constitution of a state which declares that taxes shall be uniform on all species of property taxed.

Waring v. Savannah, p. 594.

(3) Discrimination

A state income tax law is unconstitutional which grants certain exemptions to residents without providing for similar exemptions to nonresidents where there is no adequate ground for the discrimination.

Travis, Comptroller v. Yale & Towne Mfg. Co., p. 505.

A discrimination against nonresidents cannot be deemed to be counterbalanced by a provision in their favor, not so conditioned, however, as probably to benefit them to a degree corresponding to the discrimination against them.

Travis, Comptroller v. Yale & Towne Mfg. Co., p. 505.

It is not an unlawful discrimination not to compel taxpayers owning their own residences to include in their gross income the estimated rental value thereof, while not allowing taxpayers who rent residences to deduct the rent paid.

Brushaber v. U. P. Railroad Co., p. 107.

A provision that the income of a wife living with a husband be added to that of the husband is not discriminatory.

State ex rel. Bolens v. Frear et al., p. 464.

It is not an unlawful discrimination to provide a different rate of taxation for corporations than for individuals, or for one class of individuals or corporations than for another.

State ex rel. Bolens v. Frear et al., p. 464.
Robertson v. Pratt, p. 434.
Malley, Collector, v. Bowditch et al., p. 327.

Allowing one who has paid a property tax to have the amount credited upon his income tax is not discriminatory.

State ex rel. Bolens v. Frear et al., p. 464.

A state income tax act is not unconstitutional because it provides for withholding the tax at the source only in the case of nonresidents.

Travis, Comptroller v. Yale & Towne Mfg. Co., p. 505.

There is no constitutional discrimination against citizens of other states in confining the deduction of expenses and losses in the case of nonresident taxpayers to such as are connected with income arising from sources within the state.

Travis, Comptroller v. Yale & Towne Mfg. Co., p. 505.
Shaffer v. Carter. p. 448.
Equitable Life Assurance Society v. Hart, p. 201.

A state income tax law is unconstitutional which taxes the income of domestic corporations derived from sources within the state, while entirely exempting domestic corporations receiving no income from within the state.

Roster Guano Co. v. Virginia, p. 437.

A provision in an excise or income tax act restricting deductions for interest payments by corporations to an amount not to exceed a certain proportion of the paid up capital stock of the corporation or company is not discriminatory.

Flint v. Stone-Tracy Co., p. 217.
Brushaber v. U. P. Railroad Co., p. 107.
New York, N. H. & H. R. R. Co. v. United States, p. 365.
Anderson, Collector v. Forty-Two Broadway Co., p. 74.

(4) Double Taxation

Tax on dividends is not unconstitutional because the corporation is also taxed on its property and franchises.

Wells ads. Alderman, p. 599.
In re Opinion of the Justices, p. 382.

To tax the income of a person who was required to pay a license tax is not double taxation.

Commonwealth v. Werth, p. 158.

It is not double taxation to require an insurance company to pay a license fee for the privilege of carrying on an insurance business and also a license fee for doing business as a corporation.

Equitable Life Assurance Society v. Hart, p. 201.

A tax on income is not invalid because the taxpayer has paid a tax on the property in which he has invested the income.

Lott v. Hubbard, p. 316.

The assessment of an income tax on the commissions received by an agent of an insurance company is not invalid even though the insurance company pays an excise tax measured by its gross profits.

In re C. Brewer & Co., Ltd., p. 106.

There is no constitutional illegality in taxing a domestic corporation doing business in and deriving all its income from Porto Rico on its income as though it were derived from the continental United States, and also taxing it in Porto Rico.

Porto Rico Coal Co. v. Edwards, Collector, p. 410.

(5) Direct Taxation

The lack of power to levy any but an apportioned tax on real and personal property equally existed as to the revenue therefrom before the Sixteenth Amendment, as a tax upon the income of property is in reality a tax upon the property itself.

Pollock v. Farmers' Loan & Trust Co., p. 408.

The purpose of the Sixteenth Amendment was to do away with the rule existing at that time (Pollock v. Farmers' Loan & Trust Co.) of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived.

Brushaber v. U. P. Railroad Co., p. 107.
Evans v. Gore, p. 203.
Tyee Realty Co. v. Anderson, p. 513.
Stanton v. Baltic Mining Co., p. 460.

The Revenue Act of 1916, insofar as it imposes a tax upon a stockholder because of his having received a stock dividend, this being not a tax upon income, is unconstitutional as a direct tax without apportionment.

Eisner, Collector, v. Macomber, p. 196.
Towne v. Eisner, p. 500.

A tax upon the business of an insurance company is not a direct tax.

Pacific Insurance Co. v. Soule, p. 391.

A tax upon the gross earnings of a bank is a franchise tax and not a tax upon property because the amount of the tax fluctuates with the quantity of business transacted and is measured by it.

Security Savings & Commercial Bank v. District of Columbia, p. 975.

The measure of an excise tax on a privilege may be the income from all property even though part of it may be from tax exempt property.

Flint v. Stone-Tracy Co., p. 217.

A stamp tax act requiring stamps to be affixed to memoranda of sales is in effect a duty or excise tax and not a direct tax.

Nicol v. Ames, p. 371.

An estate tax is not a direct tax.

Knowlton v. Moore, p. 289.
McElligott v. Kissam et al., p. 340; same case on appeal, p. 915.
New York Trust Co. v. Eisner, p. 370.

Income is not property, and a tax on income is not a direct tax on property.

(Ga.) Waring v. Savannah, p. 594.
(Ga.) Mayor, etc., Savannah v. Hartridge, p. 336.
(Mo.) Ludlow-Saylor Wire Co. v. Wollbrinck, p. 317.

A tax on income is in the last analysis simply a portion cut from the income and appropriated by the state as a share thereof, and, while it includes some of the elements both of a tax on property and of a tax on persons, it cannot be strictly classified as a tax on either, for it is generally and necessarily an excise.

Hattiesburg Grocery Co. v. Robertson, p. 904.

A state law levying a tax on incomes of 2 to 4 per cent constitutes a violation of a constitutional provision to the effect that the legislature shall not have power to levy a greater rate of taxation than 65/100 of 1 per cent on the value of taxable property, since incomes are property within both the ordinary legal and the constitutional meaning of that word.

Eliasberg Bros. Mercantile Co. v. Grimes, p. 886.

(6) Retroactive Operation of Tax Law

The fact that a tax statute operates retroactively does not necessarily cause the act to be beyond the power of Congress.

Brushaber v. U. P. Railroad Co., p. 107.
Billings v. United States, p. 92.
Overland Sioux City Co., Inc., v. Clemens, p. 387.
United States v. McHatton et al., p. 550.
Tyee Realty Co. v. Anderson, p. 513.

A tax act which has expired may be revived and continued in existence for a longer period.

Stockdale v. Atlantic Ins. Co., p. 490.

An income tax act, which imposes a tax upon the net income for the year, including a portion of net income which was received prior to the going into effect of the act, is not therefore invalid.

Overland Sioux City Co., Inc. v. Clemens, p. 387.
Tyee Realty Co. v. Anderson, p. 513.
Schuylkill Navigation Co. v. Elliott, Collector, p. 445.
Faulkner et al., v. Trefry, p. 206.

An estate tax act is not unconstitutional because it includes transfers of property, made prior to its passage, to take effect in possession or enjoyment at or after the death of the grantor.

Union Trust Co. v. Wardell, p. 517.

An act prescribing additional procedure for the recovery by the taxpayer of illegally assessed taxes, does not apply to taxes imposed before the passage of the act, as the right to such recovery had vested.

Hubbard v. Brainard, p. 266.

A state income tax act which imposes a tax upon a portion of the net income which was received prior to the going into effect of the act is a violation of the state constitution which provides that no law, retrospective in its operation, can be passed by the general assembly.

Smith v. Dirckx, p. 455.

(7) Due Process

An income tax act which provides for notice to taxpayer, a hearing, and a suit to recover, is not unconstitutional as lacking due process.

Wells ads. Alderman, p. 599.
Kausch v. Moore, p. 280.

An act providing for the collection of the tax at the source is not repugnant to due process of law, as a taking of the property of corporations without compensation, because of the cost of collection to which they are subject.

Brushaber v. U. P. Railroad Co., p. 107.
Tyee Realty Co. v. Anderson, p. 513.

An income tax act allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such rights of deduction to corporations, is valid.

Brushaber v. U. P. Railroad Co., p. 107.
Stanton v. Baltic Mining Co., p. 460.

The taxation of the use of foreign built yachts without also taxing the use of domestic yachts is not a denial of due process.

Billings v. United States, p. 92.

Determination of invested capital under Revenue Act of 1917, not upon value, but upon cost of assets, disregarding the time of acquisition. thus preventing inclusion of appreciation, is not so arbitrary as to amount in effect to confiscation, under Fifth Amendment of the Constitution of the United States, and thus to render the act unconstitutional as a deprivation of property without due process.

La Belle Iron Works v. United States, p. 294.

A tax of seventy-two per cent upon a person's income is not confiscatory merely because of the high rate.

Towne v. McElligott, Collector, p. 501.

(8) Searches and Seizures

Even if the search and seizure provided for in an act is unconstitutional it does not mean that the whole act is unconstitutional.
Peacock & Co. et al. v. Pratt, p. 395.

The Fourteenth Amendment protecting against unreasonable seizure and searches is not violated by a law which requires returns to be filed in the office of the Commissioner of Internal Revenue and to constitute public records open to inspection.
Flint v. Stone-Tracy Co., p. 217.

A provision authorizing Internal Revenue Agents to examine private books and papers is not unconstitutional.
Perry v. Newsome, p. 402.

A statutory provision that, in all suits other than criminal, the attorney representing the Government might make a written notice for the production of any books, papers, etc., which might tend to prove any allegation made by the United States, and that if, upon notice from the court, such books, papers, etc., were not produced, the allegations stated were to be taken as confessed, is unconstitutional as applied to actions for alleged fraud under the revenue laws, because in effect compelling the dependant to testify against himself and therefore repugnant to the Fourth and Fifth Amendments of the federal constitution.
Boyd v. United States, p. 104.

(9) Law Impairing Contract Obligations

A provision in a state act allowing a trustee to reimburse himself by deducting the amount of the income tax paid by him from the amount to be paid the beneficiary is not invalid as impairing a contract obligation to pay the net income to the beneficiary.
State ex rel. Wisconsin Trust Co. v. Widule, p. 483.

(10) State Taxation Affecting Interstate Commerce

A state income tax act is not unconstitutional merely because it affects transactions involving interstate commerce, unless it places a burden thereon.
United States Glue Co. v. Town of Oak Creek, p. 581.

Interstate commerce comes to an end when goods bought outside the state are delivered to a factory and made a part of a common stock of merchandise within the state, and a tax on the sale of such goods within the state is not a burden on interstate commerce, even though the goods have undergone only a slight change in form at the factory.
Hood & Sons v. Commonwealth, p. 264.

A state income tax upon a corporation engaged in unloading railroad cars, carrying ore consigned to Eastern points, and in loading the same on vessels, is not a burden upon interstate commerce.
City of Superior v. Allouez Bay Dock Co., p. 142.

SUPPLEMENT
TO
545 UNITED STATES TAX CASES

ALWORTH-STEPHENS CO. v. LYNCH

(U. S. District Court, D. Minn., Fifth Division, March 30, 1922)
(278 Fed. 959)

Record: Revenue Act of 1917. Action to recover tax paid under protest against E. J. Lynch, as Collector of Internal Revenue, in which Margaret C. Lynch, as executrix, was substituted as defendant, after the death of the original defendant. Judgment ordered for plaintiff.

Facts: The plaintiff company was incorporated in 1907, with an authorized capital of $100,000, which was subscribed for by five persons, the subscriptions to be paid in cash at par as called for. During 1907 and 1908 five calls, of $5,000 each, were made and paid, making a fully paid-in capital of $25,000, and no further calls were ever made, and $24,000 only of stock was issued. After the year 1908 the plaintiff distributed to its stockholders as dividends all sums which it received, and before the end of the year 1909 had paid to the stockholders as dividends sums in excess of all amounts paid in by them for stock.

Upon the organization of the company in 1907 an exploratory option contract covering some 5,000 acres of land was assigned to the plaintiff. In 1908, the plaintiff discovered a body of iron ore on part of the property known as the Perkins property and took out a mining lease upon this property, pursuant to the terms of the option contract, which provided for a payment of a royalty of 30c per ton. In the same year the plaintiff subleased this property by lease which provided for payment to it of 75c per ton. Also in 1908, the plaintiff granted to an individual an option to explore and take out a mining lease on part of the land known as the Hudson property. This option was later assigned to a mining company which discovered a body of ore thereon, and thereupon, the plaintiff took out a lease upon the same, pursuant to the terms of its option contract, which provided for payment of royalties to the owners of 30c per ton. The plaintiff then subleased the property to the mining company at a royalty of 60c a ton. The income of the plaintiff consisted of the royalties paid to it by the sublessees.

On March 1, 1913, both the Perkins and Hudson Mines had been thoroughly explored and the ore in each was developed and

the amount in tonnage definitely known. It was also known that the ore would be completely mined out and exhausted within a period of seven years from that date and that it would be mined and removed and paid for under the subleases at least as fast as in equal installments during this period. The plaintiff was forced to pay to the Government the amount of an additional assessment of tax for 1917 which was assessed because of the disallowance of the depletion deduction taken by the plaintiff in its return.

Questions: (1) Was the plaintiff entitled to deduct, in figuring its income and excess profits tax for the year 1917, from the royalties received by it an allowance for depletion based on market value of plaintiff's interest in certain mines on March 1, 1913?

(2) Was the plaintiff entitled to assessment under either Section 209 or 210 of the Revenue Act of 1917, the former applying to a business having no invested capital or not more than a nominal capital and the latter to cases in which the invested capital cannot satisfactorily be determined?

Decision: (1) The court made the following among other findings of fact: That the fair market value on March 1, 1913, of the plaintiff's property interest in the ore in the Perkins mine was not less than 32.355c per ton and of the plaintiff's property interest in the ore in the Hudson mine was not less than 21.57c per ton. This market value was ascertained by multiplying the total number of tons in the Perkins mine by the net royalty of 45c per ton and the total number of tons in the Hudson mine by the net royalty of 30c per ton, considering the royalties as payable in equal annual installments for seven years from March 1, 1913, reducing the total amount so to be received to the present worth as of March 1, 1913, on a 9% discount basis, and then dividing said total March 1, 1913, value by the number of tons therein. From this it follows that the March 1, 1913, value of each dollar which the plaintiff would receive during the life of the mines for its net property interest was 71.9c, or that the value of the plaintiff's interest was 71.9% of the total net royalties which it would receive. The court then concluded that for the year 1917, the reasonable allowance for depletion to which the plaintiff was entitled as to each of these mines was 71.9c for each dollar of net

royalties which it received for said year. A risk rate of 10% on the Perkins mine and 8% on the Hudson mine, or an average of 9%, instead of a 6% basis, as contended for by the plaintiff, was approved. The court stated its reasons for allowing the deduction in the following language:

"I do not think that there can be any question but that on the 1st of March, 1913, the plaintiff owned a valuable property interest or right in both of these mines, and that the value of the property interest or right was approximately capable of definite ascertainment and should be determined on the basis above indicated. The plaintiff on the 1st of March, 1913, owned this property interest or right and has ever since owned it. It could have sold it on that day for an amount calculated on the above indicated basis, and surely until the part of that amount represented by the ore taken out is deducted, there could be no net income or profit on such ore taken out. This allowance or deduction for depletion would not be a deduction for depletion as against the owner. Under the evidence in this case, both the fee owner and the plaintiff would be entitled to such deduction, and both could get such deduction in full as to the ore taken out, without exceeding the market value of such ore in the mine as of the 1st of March, 1913."

(2) "I am also of the opinion that the invested capital of the company was, in 1917, \$25,000, and that the invested capital could not be said to be not more than a nominal capital, and that therefore the levy and assessment could not be made under either Sections 209 or 210 of the Act (Comp. St. §§ 6336⅜J, 6336⅜K), but must be made under Section 210 (section 6336⅜B)."

IN RE ANDERSON

(U. S. District Court, S. D. New York, June 23, 1921)
(275 Fed. 397)

Record: Section 64a of Bankruptcy Act. On petition of William H. Edwards, Collector of Internal Revenue, to review decision of referee. Affirmed.

Facts: The bankrupt's income tax had been levied on a return made by her in 1918. The adjudication (voluntary) was

made on October 17, 1918, and the United States never filed any proof of claim. On January 7, 1921, more than two years after adjudication, the trustee served notice upon the local collector of internal revenue of a motion to bar the United States because the tax asserted to be due was not so in fact. The United States attorney appeared specially to object to jurisdiction, but the referee overruled his objection, proceeded to liquidate the claim and after taking evidence held that the bankrupt had been improperly taxed. Thereupon he passed an order so declaring and foreclosing the United States from setting up the claim thereafter.

Questions: (1) Did the court have jurisdiction to proceed, without the filing of a claim by the United States, to liquidate the tax in question?

(2) Was notice to the Collector of Internal Revenue for the district sufficient as a condition precedent to such proceedings?

Decision: (1) "Under the present Act, it has, however, been several times held that the bankruptcy court had jurisdiction directly to reassess or liquidate a tax, regardless of its conclusiveness under the domestic law or of the procedure established to review it. * * * In all these cases the point came up upon claim filed by the taxing power, and therefore this question of jurisdiction did not arise; still the power of the bankruptcy court over the subject matter is settled. The case turns upon the implications necessarily to be drawn from Section 64a of the present Act. * * * The section shows that taxes are treated as quite different from dividends, as payments to be made before the distribution proper of the estate takes place. * * * The section contemplates that the taxes shall be liquidated and paid at once, a purpose which cannot be accomplished if the estate must wait some action by the taxing power. If the court has no power conclusively to decide the issues, it is obliged to hold up the administration until such time as the United States or a state may choose to proceed. It appears to me to be a necessary implication of the statute that some action may be taken in invitum. * * * Even assuming that jurisdiction must go as far as though the United States had a specific lien upon the property, still I think it an implication from the section that Congress meant to permit the

United States to be drawn into the proceedings so far as necessary. Therefore I agree with the learned referee in believing that he had power to make a ruling which would protect the trustee in distribution, and the only remaining question is of the actual procedure which he adopted."

(2) "Notice was probably necessary, and at least a proper condition precedent to any action, and the normal person on whom to serve notice was the official charged with the duty of collecting taxes, he who would file the claim if one was filed. * * * There is at least no other conceivable official on whom notice could be served if he be not the man, and, if Section 64a gives the court power on its own initiative to move at all, the procedure here adopted was the only one open."

IN RE ASSOCIATED TRUST

(U. S. District Court, D. Mass. Oct. 8, 1914)
(222 Fed. 1012)

Record: In Bankruptcy. On motion to dismiss petition. Motion denied.

Facts: An involuntary petition was filed in bankruptcy against "The Associated Trust," a Massachusetts real estate trust. Adjudication was sought upon the ground that the respondent was an "unincorporated company" within the meaning of the Act. The declaration of trust under which the respondent was organized, provided among other things that, if the trustee should resign, the certificate holders might elect a new trustee; that vacancies in the trusteeship might be filled by the certificate holders at meetings duly called; that special meetings might be called by the trustee, and should be called upon request of a prescribed number of certificate holders; and that the certificate holders could terminate the trust, increase the number of shares, and amend the declaration of trust, by a three-quarters vote.

Questions: (1) What is the meaning of the word "company" as used in the Bankruptcy Act?

(2) Is the respondent an "unincorporated company" within the meaning of the Act?

Decision: (1) "It would seem to imply an association of individuals not partners, carrying on business under a distinct name, and having common rights inter se, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations."

(2) "The absolute powers of termination and amendment give the certificate holders, as it seems to me, the ultimate control of the business of the trust whenever they choose to take that power into their hands. They have not done so; but the character of the organization is to be gauged rather by the powers of the certificate holders, than by the extent to which those powers have as yet been exercised. The analogy between the respondent organization and a corporation is apparent. The certificate holders clearly possess many of the most characteristic powers of stockholders. If the expression 'unincorporated company' in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words."

THE ATHERTON MILLS v. JOHNSTON

(U. S. Supreme Court, Oct. Term, 1921)
(Not yet reported)

Record: Child Labor Tax Act, approved February 24, 1919. In equity. On appeal from order of district court granting an injunction. Decree reversed with direction to dismiss the bill.

Facts: The plaintiffs were father and son. The bill alleged that the son was in the employ of the defendant; that by the terms of the Child Labor Tax Act the defendant was subject to a tax of one-tenth of its annual profits if it employed a child within the ages of fourteen and sixteen for more than eight hours a day, six days a week, or other than at certain hours of the day; and that defendant was about to discharge the minor complainant because of this Act. The bill prayed for an injunction. The defendant admitted all of the allegations except the invalidity of the Act.

Question: See Decision below.

Decision: After expressing doubt as to whether this was a real case within the meaning of the Constitution upon which the judgment of this court as to the validity of an Act of Congress under the Constitution can be involved, the court pointed out that the lapse of time since the case was heard in the District Court had brought the minor to an age which is not within the ages affected by the Act. Therefore, the Act cannot, even if valid, affect him further. The case for an injunction had, therefore, become moot and the court could not consider it.

BAILEY, COLLECTOR v. THE DREXEL FURNITURE COMPANY

(U. S. Supreme Court, May 15, 1922)
(Not yet reported)

Record: Child Labor Tax Act, approved February 24, 1919. Suit to recover tax paid under protest. On writ of error to reverse judgment entered by District Court in favor of plaintiff on demurrer to an amended complaint.

Facts: On September 20, 1921, the plaintiff, a company engaged in the manufacture of furniture in North Carolina, received notice from the collector that it had been assessed $6,312.79 for having during the taxable year employed and permitted to work in its factory a child under fourteen years of age, thus incurring the tax of ten per cent on its net profits for that year. The company paid the tax under protest, and after rejection of its claim for a refund, brought this suit.

Question: Is the Child Labor Tax Law a regulation of the employment of child labor in the States and, hence, invalid as an infringement of an exclusively State function; or is the law a mere excise tax levied by the Congress of the United States under its broad power of taxation and hence valid as such?

Decision: The Act provides a heavy exaction for a departure from a detailed and specified course of conduct in business. If an employer departs from this course he is to pay an amount not proportioned in any degree to the extent or frequency of the depart-

ures but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. "Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the Act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others see and understand this. How can we properly shut our minds to it?" * * *

"Out of a proper respect for the acts of a co-ordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the Act before us, the presumption of validity can not prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and complctely wipe out the sovereignty of the States." * * *

"For the reasons given, we must hold the Child Labor Tax Law invalid, and the judgment of the District Court is affirmed."

BAILEY, COLLECTOR v. GEORGE

(U. S. Supreme Court, October Term, 1921)
(Not yet reported)

Record: Child Labor Tax Act. In Equity. On appeal from decree entered by District Court (274 Fed. 639) granting an injunction. Reversed and remanded with directions to dismiss the bill.

Facts: The decree recited that complainants operated a cotton goods plant; that defendant collector assessed against them a tax of $2,098.06 on the ground that they employed children in their factory within the age limits prescribed in the Child Labor Tax Act; that complainants filed a claim for abatement of the tax which was denied and that the defendant was about to distrain complainant's property.

Question: Does complainant's bill set forth ground for equitable relief?

Decision: The court points out that Section 3224 R. S. prohibits any suit for the purpose of restraining collection of any tax. "The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable. Dodge v. Brady, 240 U. S. 122, 126, 60 L. ed. 560, 562, 36 Sup. Ct. Rep. 277. In spite of their averment, the complainants did not exhaust all their legal remedy. They might have paid the amount assessed under protest, and then brought suit against the collector to recover the amount paid, with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy."

BALTIMORE & OHIO RAILROAD CO. v. UNITED STATES

(United States Court of Claims, May 16, 1921)
(Not yet reported)

Record: Stamp Act of October 22, 1914. Suit to recover stamp taxes paid. On demurrer to plaintiff's petition. Demurrer sustained and petition dismissed.

Facts: On October 1, 1915, thirteen railroad companies executed and delivered to the plaintiff company deeds conveying the

property of these companies to the plaintiff. The plaintiff company having some doubt as to the application of the Stamp Act to the transaction applied to the Commissioner for a ruling, at the same time exhibiting three of the deeds. The Commissioner held adversely to plaintiff's contention, and the plaintiff, without protest, affixed to each of the deeds the requisite amount of stamps. Four years thereafter the Commissioner in construing the Act of 1918 held "that where no valuable consideration passed, stamps were not required on conveyances." On September 22, 1919, the plaintiff filed with the Commissioner its claim for refund of the said taxes, which was based upon the above ruling of the Commissioner which apparently was applicable to plaintiff's case. This claim was rejected because of the intervention of the statute of limitations which provided for a period of two years after the purchase of the stamps from the Government for the filing of a claim for refund.

Question: The plaintiff's contention was that the claim for refund filed in 1919 was no more nor less than an amendment of its so-called informal claim for an abatement filed in 1915, thus perfecting the former and for the first time claiming a refund of the taxes, thereby escaping the statute of limitations.

Decision: "The facts alleged bear absolutely no similarity to either a claim for abatement or refund of the taxes now alleged to be illegal. On the contrary, prior to affixing the stamps to the deeds in issue the plaintiff company exhibited to the commissioner three specific copies of the deeds, each containing only a nominal consideration, stating that in its opinion no stamp tax should apply to said deeds, and asking for a ruling of the commissioner with respect thereto. The commissioner promptly complied with the request, and the plaintiff instead of asking for an abatement of the same thereafter purchased the stamps, affixed them to the deeds, cancelled the same, and accepted the ruling of the commissioner, never seeking in any manner to challenge its conclusiveness until some four years later it discovered in the decision of a case in which it was in nowise concerned there existed a possibility to proceed now as it should have proceeded four years ago. The widest latitude has been allowed the vigilant in the matter of amendment of claims for refund of illegal taxes, but no authority has been cited

wherein the courts have gone to the extreme, no matter how apparent the equities of the situation, in sustaining a claim after a long repose and which would doubtless have continued in such a state say for the persistence and vigilance of a later and another claimant, the ruling in whose case affords prospects of recovery for an abandoned claim.

"We think the Commissioner was right when he rejected the claim."

BALTIMORE TALKING BOARD CO. v. MILES, COLLECTOR

(U. S. Circuit Court of Appeals, Fourth Circuit, 1922)
(280 Fed. 658)

Record: Revenue Act of 1918. Action to recover taxes paid. Error to U. S. District Court, District of Maryland, which rendered judgment for defendant. 273 Fed. 531. Judgment affirmed. Petition for writ of certiorari denied, June 5, 1922.

Facts: A tax of $202.81 was collected from the plaintiff, being 10% of its gross sales of ouija boards, on a theory that ouija boards were "games" within the meaning of Section 900 of the statute.

Questions: (1) Did the mere fact that ouija boards were not expressly mentioned in the statute prevent their being taxable?

(2) Are ouija boards taxable under Section 900 of the statute as "games."?

(3) What weight is to be given to the findings and practice of the administrative officers of the Government?

Decision: (1) "In Gould v. Gould (245 U. S. 151) the court says: 'In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.' * * * But the doubt as to the meaning of the statute must be one which remains after all recognized rules for ascertaining its meaning have been tried. As to the analogous rule requiring strict construction of statutes exempting property from taxation the Supreme Court has said:

'Its proper office is to help solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute.' (Citizens Bank v. Parker, 192 U. S. 73, 86.) Doubt as to the meaning of a word is often removed by consideration of the legislative intent as shown by the entire statute. (American Surety Co. v. District of Columbia, 224 U. S. 491.) Considering the comprehensive scheme of taxation which the statute was intended to provide its words should not be given a narrow meaning. The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life. Even when seriously used the ouija board certainly comes within the general spirit and purpose of the statute."

(2) "On the whole the conclusion seems fair that the present chief purpose of the ouija board is to supply amusement and diversion and that it should be held to fall under the comprehensive term 'games' within the meaning of the statute."

(3) "The principle is also to be borne in mind in support of this conclusion that the findings and practice of the administrative officers of the Government are presumed to be based on fair conclusions as the result of the investigation required of them by Sections 3165 and 3172 of the Revenue Act of 1918."

BANKERS' AND PLANTERS' MUTUAL INSURANCE ASSOCIATION v. WALKER, COLLECTOR

(U. S. Circuit Court of Appeals, Eighth Cir., February 10, 1922)
(279 Fed. 53)

Record: Revenue Act of 1917. Action to recover taxes paid under protest. Judgment for defendant. In error to District Court of the United States for the Eastern District of Arkansas. Judgment affirmed.

Facts: The plaintiff was an association organized for the purpose of insuring the lives of its members and the plan of operation

divided members into "circles" of approximately one thousand each. In the event of death of any member the other members of that circle were assessed pro rata according to age and length of membership, beginning with a minimum charge of 25c and a maximum charge of $1.12 for each death. The amount of insurance of each member at entrance was $100, which amount increased after the first six months at the rate of $12.50 per month to a maximum of $1,000, provided all dues and assessments were promptly paid. The assessments were sufficient to provide for maintaining the business organization and operation but no reserves, surplus or other funds were provided, and no dividend or profit could be earned. A premium tax was assessed and collected under the provisions of Section 504 of the Revenue Act of 1916 upon the $100 original certificates and also upon the accrued valuation of $12.50 monthly after the first six months. The plaintiff claimed, first, that it was not subject to tax under the provisions of Section 504, but if subject to tax at all, then only upon the basis of the original certificate value of $100.

Questions: (1) Was the plaintiff an insurance company within the meaning of Section 504 of the Revenue Act of 1917 imposing a tax on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument, by whatever name the same is called?

(2) Did the plaintiff come within the exemptions provided for in subdivision (d) of Section 504 of the Revenue Act of 1917?

(3) Was the plaintiff "a like organization" within the meaning of subdivision (10) of Section 11a Revenue Act of 1916?

(4) Was the plaintiff properly taxed upon the accrued increase in valuation upon the basis of $12.50 monthly as well as upon the initial certificate value of $100?

Decision: (1) "The argument as to the first contention is that plaintiff is not an insurance company, but merely 'a mutual aid society, organized for the mutual benefit of its members upon the pro rata assessment plans, has no capital stock, and makes absolutely no profit for the members thereof.' This contention is unsound, because this is a purely life insurance arrangement and business,

and Section 504 does not require profits or dividends as a prerequisite to this tax.''

(2) Said association is not exempt under Subdivision (d) of Section 504 of the Revenue Act of 1917 which exempts policies issued by associations whose income is exempt from taxation under title I of the Revenue Act of 1916, the association not coming within the meaning of either the third, sixth, or tenth paragraph of Section 11a of said latter Act, which, respectively, limit the exemption to fraternal beneficiary societies operating under the lodge system, to non-profit organizations which are organized and operated exclusively for religious, charitable, scientific, or educational purposes, and to farmers' or other mutual hail, cyclone, or fire insurance companies, mutual or co-operative telephone companies, or like organizations of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses.

(3) ''It is also evident that plaintiff does not come within the 'like organization of a purely local character, the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting its expenses' as set out in subdivision 'Tenth' of Section 11a, above quoted. This is not a 'purely local' organization; its income is not collected for the mere purpose of 'meeting its expenses,' but goes much beyond this and covers insurance payments; and it is not a 'like organization', such organizations being 'farmers' or other mutual hail, cyclone or fire insurance company, mutual ditch or irrigation company, mutual or co-operative telephone company.' Life insurance is too well known and important for us to suppose that Congress would detail hail, cyclone, and fire insurance, and intend life insurance to be included in the general expression of 'life association'. The plaintiff is clearly liable to the tax.''

(4) ''The provisions of the statute relied upon * * * are as follows: 'There shall be levied, assessed, collected, and paid the following taxes on the issuance of insurance policies: (a) Life insurance: a tax equivalent to 8c on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument, by whatever name the same

is called.' This quoted passage defines the subject of taxation to be 'the issuance of insurance policies.' It then sets out the rate of taxation on the issuance of life insurance policies to be 8c 'on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance', etc. The policies, or instruments, of insurance issued by plaintiff called for $100 and accumulations. Every condition of the contract which might affect the payment of the accumulations might equally effect the minimum of $100. Therefore the amount of insurance called for by the contract cannot, in any sense, be said to be $100, rather than that sum plus accumulations which might have been earned by the member. Such accumulations, do not, therefore, fall without the intent of the statute. * * * The assessment was properly levied against the $100 minimum and the accumulations earned at the time of the assessment, because that total sum represented at that time, under this form of insurance contract, the 'amount of insurance' intended by the statute.''

BANKERS' TRUST CO. v. STATE

(Supreme Court of Errors of Conn., June 1, 1921)
(114 Atl. 104)

Record: Conn. Gen. St. Sec. 1190. Application in nature of an appeal wherein the state demurred and the court reserved the questions of law arising on the demurrer for the advice of the Supreme Court of Errors. Judgment advised to sustain demurrer and dismiss appeal.

Facts: The plaintiffs, as executors of an estate, were assessed the sum of $10,286.39 under Gen. St. Sec. 1190. This statute provides that property which has not been subject to a town or city or state tax during the year preceding the death of the decedent is liable to a tax of 2 per cent of its appraised value for the five years next preceding the date of death of decedent, provided that a proportionate reduction of the tax may be had by proof that any part of the tax has been paid or that the decedent did not own any of this property during this period. Thereupon the executors made this application in the nature of an appeal.

Questions: (1) Is the tax imposed under Gen. St. Sec. 1190 a succession tax?

(2) Is the statute authorizing the tax in question unconstitutional?

Decision: (1) The tax is not a succession tax nor in the nature of one because it is imposed upon the gross value of that portion of the estate which has not paid a state or local tax in the year preceding the decedent's death and also because there is absent the classification which all succession taxes make. "This is not the compulsory payment of a defined tax, but is the infliction of a punishment for a violation of a public duty. The authors of this statute intended it as and for a penalty tax, and such we esteem it to be. The right of the state vests at the death of the decedent to the transfer tax or the penalty in the nature of an estate tax."

(2) The statute is not unconstitutional for:

It is not void as an ex post facto law for this provision relates only to laws respecting criminal punishment.

It does not impose an excessive fine in violation of the Connecticut Constitution, because the offense here punished is neither a crime nor a misdemeanor and so the constitutional provision involved has no possible relation to it.

It is not in conflict with the Fourteenth Amendment to the United States Constitution, as depriving creditors and distributees of their property without due process, because the right to dispose of one's property by will and the right to have it disposed of by the law after decease is created by statute, and therefore the state may impose such conditions upon the exercise of this right as it may determine. Furthermore, the statute can not be pronounced so purely arbitrary as to be prohibited by the Fourteenth Amendment.

BERGDOLL v. POLLOCK
(U. S. Supreme Court, 1877)
(95 U. S. 337)

Record: Secs. 3225, 3226, 3337, R. S. Action to recover taxes paid. Appeal from judgment for defendant. Judgment affirmed.

Facts: An additional assessment was collected from the plaintiffs for having removed 1350 barrels of beer without the proper stamps. Sec. 3337, R. S. required that every manufacturer of fermented liquors keep a record of the quantity produced and the quantity sold or removed for consumption, and the quantity of material purchased. A return was also required to be rendered

each month. The plaintiffs offered to prove in the trial, by witnesses, that their returns did not contain an understatement.

Question: In view of the requirement that books be kept, was the evidence of witnesses admissible to show that the returns were not understated?

Decision: "His books are not necessarily conclusive for or against the government under all circumstances; but if properly kept, as they must be to avoid the penalties of the law, they ought, so to speak, to furnish the base from which his evidence must spring. * * * The books, with proper explanations in respect to entries which appear in them, ought to constitute the best evidence in the case; and until it is shown that they cannot be produced, or that they do not contain the information required, no evidence of such remote circumstances is admissible. In this case there was no attempt to account for the absence of the books, or any claim of defective entries and we think the court did not err in excluding the testimony."

EVERETT C. BROWN AND S. B. ST. JOHN, CO-PARTNERS, DOING BUSINESS AS BROWN-ST. JOHN CO., v. SMIETANKA, COLLECTOR OF INTERNAL REVENUE

(U. S. District Court, Northern District, Illinois, June 10, 1921.)
(Case No. 33,167, not yet reported)

Record: Revenue Act of 1918. Action at law to recover special taxes paid under protest, levied under par. 1, section 1001 of the Revenue Act of 1918 on the privilege of doing business as brokers. Defendant filed a general demurrer to plaintiff's declaration. Demurrer overruled. Judgment for plaintiff.

Facts: It was alleged in plaintiff's declaration that the plaintiffs are live-stock commission merchants in Chicago, Ill., dealing in cattle, sheep and hogs, consigned to them; that under par. 1, section 1001 of the Revenue Act of 1918 the Collector of Internal Revenue exacted of them a special tax; that said taxing statute is in part as follows:

"Brokers shall pay $50. Every person whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, other securities, produce or merchandise, for others shall be regarded as a broker."

The defendant filed a general demurrer to the declaration, and contended thereunder that cattle, sheep and hogs are "merchandise," and come within the Act.

Question: Does the word "merchandise," as used in section 1001 of the Revenue Act of 1918, include "live stock," so as to render live stock commission brokers subject to the special tax imposed on "brokers" by the provisions of said statute?

Decision: U. S. District Judge Page in overruling defendant's demurrer, and holding that said section was not intended to cover live stock brokers, stated that in several cases the courts have said that while live stock does not usually come within the term "merchandise," yet sometimes it may; U. S. v. One sorrel horse, 27 Fed. Cases, 15,953; Jewell v. Board of Trustees, 84 N. W. 975 (Iowa). The court, however, declined to agree with the Government's contention that the special reasons for holding that live stock comes under the 1918 Act are found in the various Acts providing for the assessment of special taxes. The court quoted from section 79 of the Act of June 30, 1864, which included brokers, horsedealers, cattle brokers, produce brokers and commercial brokers. Reference is then made to the Act of October 22, 1914, which provided for a tax on brokers, commercial brokers and commission merchants. It is pointed out that in the 1918 Act commercial brokers, cattle brokers, or commission merchants are not designated by name.

The court then concluded as follows:

"From a consideration of the several acts it is perfectly clear that there was not running through all of the acts any well defined scheme of classification of subjects to be taxed. For instance in the Acts of 1898 and 1914, horse dealers and four different sorts of brokers are mentioned. In the Acts of 1898 and 1914 only two kinds of brokers were taxed, and in the Act of 1918 only one kind was taxed. That is to say; in the Acts of 1864 and 1866 there were brokers, cattle brokers, produce brokers and commercial brokers; in the Acts of 1898 and 1914 there were brokers and commercial brokers; and in the Act of 1918 just brokers. In none of the acts prior to 1918 was the word 'merchandise' used in connection with any kind of a broker, except that it appeared in all of the acts defining a commercial broker, and in the section of the Act of 1914 taxing commission merchants.

"The theory of the Government is that the word 'merchandise' in the Act of 1918 was adopted from the sections relating to commission merchants in the Act of 1914, but from a reading of the several acts it seems to be much more probable that it was adopted from the sections relating to a commercial broker, because all of the sections relating to commercial brokers, as well as the section here in question, describe not only a broker, but also a commercial broker as a person whose business it is to negotiate purchases or sales, whereas, a commission merchant is defined as a person, etc., whose business or occupation it is to receive into his or its possession any goods, etc. It will be noted that in all of the acts relating to brokers, including the one in question, the business to be done, that is negotiating sales or purchases of goods, etc., was not changed, but the things to be negotiated about were varied as indicated.

"The allegations of the declaration would bring the plaintiffs within the terms of the Act of 1914 relating to commission merchants, if the word 'merchandise,' as used in that section covered live stock, but live stock does not in my opinion come within the provisions of the Act of 1918. A thing is not to be taxed unless it is plainly within the meaning of the words used. (First Trust and Savings Bank v. Smietanka, 268 Fed. 230). The demurrer is overruled."

BUGBEE, COMPTROLLER v. ROEBLING et al.

(Court of Errors and Appeals of N. J., June 21, 1920)

(111 Atl. 29)

Record: New Jersey Transfer Tax Act as amended in 1914 (P. L. 267). Proceedings relative to determination of tax. Judgment in favor of executors and the comptroller appeals. Affirmed.

Facts: See Question.

Question: Should the amount of the federal estate tax be deducted in ascertaining the clear market value of the taxable transfer under the Transfer Tax Act?

Decision: "We have therefore a tax which the statute requires shall be calculated on the value of the ultimate beneficial succession, at a rate which depends upon the propinquity of the legatee to the decedent; and each legatee sufficiently near to the

decedent is entitled to an exemption of $5,000. We think that these provisions indicate that the tax is to be calculated on the beneficial interest actually received by the legatee, and not on what he would receive if there were no federal tax." The conclusion of the court, therefor, was that the federal tax must be deducted.

CARTIER et al. v. DOYLE, COLLECTOR

(U. S. Circuit Court of Appeals, Sixth Cir., December 15, 1921)
(277 Fed. 150)

Record: Act of October 3, 1917. Action at law to recover excess profits taxes paid under protest under Sections 201 and 210. In error to the District Court which entered a judgment for defendant. (269 Fed. 647, ante 126.) Reversed.

Facts: In 1912, Cartier and Holland entered into a written contract of partnership for the purpose of manufacturing and dealing in forest products. It was further agreed that the paid-in capital of the partnership should be $30,000, to be furnished by Cartier, as the requirements of the partnership should appear, upon the note or notes of the partnership to be paid from earnings of the partnership and to bear legal rate of interest. It did not appear from the evidence that the partnership ever manufactured any forest products, but it did purchase lumber and kindred commodities for its customers. After the organization of the partnership Cartier furnished it some money and took its notes therefor, but in 1914 a new arrangement was entered into by which the partnership borrowed the money required in its business directly from the bank and executed its notes therefor. These notes were indorsed by both Cartier and Holland, and Cartier left upon deposit with the bank, as collateral to his indorsement of these notes, securities theretofore deposited by him when he borrowed the money in his own name and loaned it to the partnership. This method of transacting the partnership business was continued until and during the year 1917, and in this way the partnership obtained all its capital. During the time the partnership was operated Cartier drew out of the business $11,556.37, and Holland, $18,906.28, which amounts were charged to them on the books. If these amounts were reckoned as assets of the partnership, then

on January 1, 1917, there was a net surplus of assets over and above liabilities of $22,443.80; otherwise the liabilities of the partnership would exceed its assets by the sum of $7,218.85. The return of the partnership showed the excess profits tax computed under Section 209 of the Act, applying to concerns having an invested capital not more than nominal. The Commissioner contended that the firm should be assessed under Section 201, upon its invested capital, or under Section 210, on the ground that the invested capital, although more than nominal, could not be satisfactorily determined. Additional tax was assessed accordingly and was paid.

Question: Did the partnership described above, during the year 1917 have an invested capital within the meaning of Sections 201, 207, and 210 of Title 2 of the Act of October 3, 1917?

Decision: "If this question were to be determined separate and apart from the Act levying this excess profits tax, then it would be of easy solution. Money invested in a partnership business, whether paid in by the partners or borrowed from a partner or a bank, in the absence of legislation to the contrary, would constitute invested capital in the ordinary meaning and acceptation of that term." The court then calls attention to the fact that Congress in Section 207 has defined the term "invested capital" and that by such definition invested capital does not include borrowed money.

"It would seem unnecessary to say that a private contract between these parties would not change or affect in the slightest degree the plain and positive terms of the statute, declaring what shall be included and what shall not be included as 'invested capital,' for the purpose of this tax. If the articles of copartnership had provided that the paid-in capital of the partnership should be $30,000, one-third of which should be paid in cash or in property by the partners, and $20,000 to be borrowed from a bank upon the notes of the partnership, indorsed by the partners, and further secured by the deposit of such collateral as the bank might demand, the money borrowed in pursuance of such partnership agreement, fixing the total capital of the partnership at $30,000, would necessarily be rejected as invested capital in the computation of surplus

income taxes levied under this act. It logically follows that if, under this statutory definition of invested capital, money borrowed could not be included as capital where some substantial amount of cash had actually been paid into the partnership fund by the partners, such borrowed money cannot be reckoned as invested capital where the partners contributed neither cash nor property to the partnership fund.''

It is also unnecessary to determine whether under the original agreement the money to be furnished by Cartier, to be repaid out of the partnership earnings, would or would not be borrowed money within the meaning of the Act, since this plan of operation was abandoned in 1914. ''Nor is it important at whose suggestion this plan of operation was changed and a new plan adopted. It is sufficient for the purposes of this opinion to determine the legal effect of these transactions as they occurred during the taxing period of 1917.'' (The trial court based its finding for the defendant upon the conclusion of law that the collateral deposited by Cartier as security for his liability as an indorser of the partnership notes became a part of the working capital and was used and employed in the business of the company to the same extent as if it had been paid directly into the partnership funds.) ''The evidence in relation to these transactions permits of no conclusion other than that the money borrowed from the bank upon the notes of the partnership was 'borrowed money,' within the meaning of Section 207 of the Act of Congress approved October 3, 1917.''

The Act in question defines ''invested capital'' as follows: ''(1) Actual cash paid in.'' There is no claim made by the Government that there was any ''actual cash paid in'' to the partnership funds other than the money borrowed from the bank on the notes of the partnership. ''(2) The actual cash value of tangible property paid in other than cash for stock or shares in such corporation or partnership.'' In this case there was no tangible property paid in by either partner for the purpose named or for any other purpose. The collateral deposited by Cartier could not upon any reasonable hypothesis be held to be 'tangible property paid in' to the partnership. ''(3) Paid-in or earned surplus and undi-

vided profits used or employed in the business exclusive of undivided profits earned during the taxable year.'' Whether this partnership used or employed in its business paid-in or earned surplus and undivided profits exclusive of undivided profits earned during the taxable year is a question of fact. The trial court found as a fact that at the beginning of the taxable year the liability of the firm exceeded its assets by the sum of $7,218.85. This court has no authority to determine the weight of the evidence. The finding of the trial court in this respect is fully sustained by substantial evidence.

''For the reasons above stated, this judgment must be reversed, and the cause remanded for a new trial in accordance with this opinion.''

CASTNER, CURRAN & BULLITT, Inc., v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Penn., Aug. 18, 1921)
(275 Fed. 221)

Record: At Law. Action by Castner, Curran & Bullitt, Inc., against Ephram Lederer, Collector of Internal Revenue. On trial. Hearing without a jury. Findings made.

Facts: The plaintiff is a Delaware corporation, with a total issued capital stock of $1,500,000, of which $300,000 is first preferred stock issued for cash. The corporation is a result of the combination of two business ventures and two property interests, known as the ''Castner'' and the ''Hyman'' interests. This combination took place in 1916. The capital of the plaintiff consisted of all which belonged to the two former ventures with $300,000 of cash capital contributed by Hyman. For this there was issued to him shares of first preferred stock of a nominal value in that sum. Shares of a nominal value of $600,000 were issued to each interest in consideration of the making over to the new corporation of what was represented in the business of both the old ventures. This gave the corporation a nominal capital of $1,500,000.

Question: ''The whole question is one of fact, to-wit, the value of the property for which the $1,200,000 of stock was issued.

* * * The plaintiff asks the court to find the total value of the 'invested capital' (exclusive of 'intangible' property in excess of $300,000) to be $4,151,138.20. The defendant asks for a finding of the value of the same property of $725,509.10.''

Decision: The finding of the court was that: ''The value of all the effects and property of the plaintiff (inclusive of the $300,000 of so-called 'cash') was at the time affecting this tax levy $1,500,000, and so far as it is a question of fact the 'invested capital' of the plaintiff is found for taxing purposes to have been that sum.'' The court pointed out that, while the Act of Congress does not limit the valuation of ''tangible'' property acquired by an issue of stock to the nominal value of the stock so issued, as it does in the case of ''intangible'' property, nevertheless, one who contributes property to the capital of a corporation makes a declaration of its fair value. ''It is the common or joint declaration of the contributor and the corporation. As such, it is, as against the declarants, evidence at least equally as convincing as other declarations of opinion made or procured subsequently when the interests of the parties have shifted.'' * * * '' 'Actual cash value,' 'value in actual cash,' and other like expressions convey the thought of the sum which can be obtained for them at a fair sale. This means market value. None of the witnesses who testified to the values given had any such test in mind.'' The court, accordingly, rejected the values placed by witnesses on the property which was largely in excess of the nominal value of the stock issued for such property. Judgment in the case was not entered because the court did not have at hand the data from which the judgment could be figured. As a consequence, the court retained jurisdiction of the cause for this purpose and granted leave to either party to move for the proper judgment with cost.

CATHERWOOD v. UNITED STATES

(U. S. District Court, E. D. Pennsylvania, 1922)

(280 Fed. 241)

Record: Revenue Act of 1918. Action to recover taxes paid. Sur affidavit of defense raising questions of law. Judgment for defendant.

Facts: Plaintiff's testatrix died on August 22, 1920, and letters testamentary were granted to the plaintiff on August 25, following. On February 25, 1921, plaintiff filed a return of the income of the testatrix for the period between January 1, 1920, and August 22, 1920. The income tax upon the income of the decedent for the period in question was paid at the time of filing the return. The plaintiff also filed a return of the income of the estate for the period between August 22, 1920, and January 1, 1921. There was no taxable net income for this period. Plaintiff also filed an estate tax return and paid a tax of $10,142.99, in accordance with this return. The sum so paid was in excess of the income tax paid on the basis of the net income of the decedent to the time of her death, and plaintiff claimed that the estate tax was properly deductible from the income tax paid, and demanded return of the latter.

Question: Was the estate tax paid deductible, under the decision of U. S. v. Woodward, 256 U. S. 632, ante page 580, from the gross income of the decedent for the period January 1, 1920, to August 22, 1920?

Decision: "Upon a full survey of the statute, our conclusion is that there are two taxpayers—and not one—the decedent, who pays on his income to the time of his death, and his estate, which pays on the income of the estate and an estate tax. It is true the three taxes are paid out of the estate, but the first is paid as the tax upon the income of the decedent, and is paid as all his other debts are paid. The other taxes are paid as taxes assessed against the estate. If the two income taxes were one, they would be returned and paid as one, based upon the income for the whole taxable year. Instead of this, they are returned and paid separately as upon the incomes of different taxpayers. There is an artificiality about this which makes one reluctant to take this view, except upon compulsion. The tax Acts, however, seem to compel us to take this view. Under the doctrine of Woodward's estate, the estate tax is to be deducted in finding the net taxable income of the estate. The conclusion is reached, however, that it is not to be deducted in finding the net taxable income of the decedent who is another taxpayer."

CENTRAL UNION TRUST CO. v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, 1922)
(Not yet reported)

Record: Revenue Act of 1916. Action to recover capital stock tax paid under protest. Judgment for defendant.

Facts: In its original capital stock tax return the plaintiff stated the par value of its capital stock as $5,000,000, its surplus at $15,000,000, and its undivided profits as $1,968,455.09. Adding these together and taking the deduction allowed by law, a tax was shown as due in the sum of $10,934.50. Under Exhibit B the return showed that quotations upon the stock of the company for the years 1916 and 1917 were $788.75. Taking the stock valuations, the Commissioner assessed an additional tax in the sum of $8,734.50. The plaintiff paid the additional tax and filed claim for refund, contending that the proper basis for the valuation of its capital stock was to add paid-in capital, surplus, and undivided profits, less liabilities; in other words, the net value of the capital assets of the corporation after deducting its debts. Upon an investigation the net income for the years 1913 to 1916 was capitalized and a value per share of stock determined as $575.97. The claim for refund was therefore allowed in the sum of $5,319.50. Plaintiff then brought suit to recover the balance rejected on a consideration of the claim for refund.

Questions: (1) What is the meaning of the words "capital stock" as used in the capital stock tax law?

(2) What is the correct method of valuing capital stock for the purposes of the capital stock tax?

Decision: (1) "The act in question provides for the annual payment of 'a special excise tax with respect to the carrying on or doing business by such corporation, equivalent to 50c for each $1,000 of the fair value of its capital stock and in estimating the value of its capital stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year.' The words employed indicate rather an appraisal of the value of the 'capital stock' ar-

rived at by considering various factors of value, by the exercise of judgment; than an auditor's exact determination of the value of the net worth of tangible assets, taken from the corporate books of account. If the value of good will and franchises, earnings and market value of shares, are eliminated as factors of value, then the computation of value would in no sense be an estimation; the value would be the exact value rather than the fair value; and it would have been made determinable as of the end of a fiscal year; rather than by 'the fair average value of the capital stock for the preceding year.' "

(2) "I believe the collector was confronted with the proposition of determining the value of the corporation's business and property as an entirety and as a going concern, and in doing so had the right to look to the net worth of the corporate assets, including its surplus and undivided profits, as shown by its books; also to the franchises, good will, outstanding contracts, the earning capacity of the corporation and the market value of its share stock over the preceding year, and, after having done so, was authorized to arrive at a value for its entire capital stock, representing the enterprise as a going concern, according to his best judgment; and that the value, so ascertained, would be the 'fair average value of the capital stock for the preceding year,' by which the tax by the terms of the statute is to be measured."

CLARK, et al., EXECUTORS v. BLALOCK, COLLECTOR

(U. S. District Court, N. D. of Ga., March 1, 1922)
(Not yet reported)

Record: Revenue Act of 1916. At Law. Petition dismissed.

Facts: This case arises under the estate tax provisions of the Revenue Act of 1916 and involves the inclusion in the gross estate, under Section 202 (b), of property conveyed by decedent in 1882, reserving therein a life estate.

Question: Does the Revenue Act of 1916 include in the gross estate of a decedent transfers made by him before the Act went into effect?

Decision: This case depends upon a question considered and decided in one way by Judge Rose, in Curley et al., v. Tate, Collector, 276 Fed. 840, and decided in another way by the Circuit Court of Appeals of the Sixth Circuit in Shwab v. Doyle, Collector, 269 Fed. 321 and by Judge Rudkin in Union Trust Co. v. Wardell, Collector, 273 Fed. 733. I think the weight of reason and authority is with the latter view. The power of Congress to exact the tax, if it did so in fact, is not disputed. The whole question is whether the words "of which decedent has *at any time* made a transfer" were intended to apply to transfers made before the Act of 1916 went into effect. Congress, in reenacting the provision, in 1918, added in parenthesis "whether said transfer or trust is made or created before or after the passage of this Act." These words, while more explicit, are not more comprehensive than those previously used, and I think were intended not to change but to make clear the law. Entertaining this view, the petitioners are not entitled to recover and an order will be granted dismissing their petition.

COLEMAN v. UNITED STATES

(U. S. Supreme Court, May 19, 1919)
(250 U. S. 30)

Record: Act of June 13, 1898. Act of July 27, 1912. Action to recover taxes paid. Appeal from Court of Claims which rendered judgment for defendant (53 Ct. Cls. 628). Judgment affirmed.

Facts: On May 29, 1903, the plaintiff paid a tax of $6,721.71 upon the distributive share of the children of Walter H. Coleman in his personal property. The tax was paid under the Act of June 13, 1898. The later Act of June 27, 1902, directed the refunding of so much of such taxes "as may have been collected upon contingent beneficial interests which may not have vested prior to July 1, 1902," and forbade a tax to be imposed upon such an interest. The interest of the children of Coleman was contingent within the meaning of this Act, although he died before July 1, 1902. On March 17, 1914, claimants filed a claim for refund which was rejected. This suit was then commenced, on March 9,

1916. The Act of July 27, 1912, provided that "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected" under the Act of June 13, 1898, "or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter."

Question: Was the plaintiff's right to a refund barred by the Act of July 27, 1912?

Decision: "The act is entitled An Act Extending the time for repayment of certain war revenue taxes erroneously collected; and the claimant contends that the present claim is not of that sort, that this tax having been paid without protest or any reservation of rights, the claim is only for a bounty conferred by the Act of 1902 and that the benevolence of that act never has been withdrawn. But, bounty or not, the direction in the Act of 1902 was on the footing that the sums ordered to be repaid were collected erroneously, Vanderbilt v. Eidman, 196 U. S. 480, and was an order for the refunding of a tax alleged to have been erroneously collected. The present tax had not been collected when the Act of June 27, 1902, was passed, but was collected afterwards contrary to its terms. There was little bounty in its application to such a case. No argument can make it plainer than do the words themselves that the Act of 1912 applies to the present claim, and that it was presented too late."

COMMERCIAL HEALTH & ACCIDENT CO. v. PICKERING, COLLECTOR

(U. S. District Court, S. D. of Illinois, S. D.)
(281 Fed. 539)

Record: Revenue Acts of 1917 and 1918. Action to recover taxes paid under protest. Judgment for defendant.

Facts: The plaintiff, a mutual life, health and accident insurance company, based its action upon the theory that it comes within the exempted class specified in paragraph 10, section 11, Title I of

the Act of 1916, which was reenacted in the Acts of 1917 and 1918. Paragraph 10 is as follows:

"Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or co-operative telephone companies, *or like organizations of a purely local character*, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses."

Questions: (1) Should the exemption proviso of a revenue law be liberally or strictly construed?

(2) Do the words in the exemption proviso "of a purely local character" limit only the proviso "or like organizations" or do they limit all of the enumerated companies set out in the paragraph?

(3) Is the plaintiff "a like organization of a purely local character" within the meaning of the statute?

Decision: (1) "A claim of exemption from taxation must be clearly made out." The court followed the rule laid down in United States v. Dickson, 15 Fed. 141, to the effect that an exemption proviso must be strictly construed.

(2) "We do not believe it was the intention to exempt 'farmers' or other mutual hail, cyclone, or fire insurance companies,' etc., generally, but only such as are 'of a purely local character'; nor mutual or co-operative telephone companies, generally, but only such as are purely local in their character. In other words, we do not feel that the words 'of a purely local character' are words of limitation only upon the provision 'or like organizations,' but rather upon all of the especially enumerated businesses set out in the entire paragraph. A proper reading of this paragraph requires the interpolation of a comma after the words 'like organizations.' "

(3) "At the time of the enactment of these laws 'farmers' or other mutual * * * companies * * * telephone companies,' or the like, 'of a purely local character' were numerous and the mere naming of one of them was its most perfect description, which was well known and fully understood to mean a local mutual telephone company, such as a farmers' party line with its little exchange; neighborhood anti-horse thief societies; the local farmers'

insurance societies, and the like. Such expressions did not include a general life, health and accident insurance company organized under a general law and doing a general business throughout an entire State—such a concern as the plaintiff, with general offices in Springfield, and subordinate headquarters in Chicago, Decatur, and East St. Louis, and this, even though at the time of the filing of the declaration herein the plaintiff had done no business outside the geographical limits of the State."

CONGDON v. LYNCH

(U. S. District Court, Minnesota, Third Division, March 13, 1922)
(Not yet reported)

Record: Revenue Act of 1916. Action at law to recover federal estate taxes paid under protest. Judgment for plaintiff.

Facts: On August 3, 1916, Chester A. Congdon entered into a trust agreement with his wife and children as trustees. The property conveyed in this agreement consisted largely of interests in mines and mineral land and in the securities of corporations owning mines and mineral lands. Provision was made for the distribution of the income from the trust property to the wife and children. Article 10 of the trust agreement provided as follows: "The donor reserves the right at any time and from time to time: (a) to change the beneficiaries hereunder and their respective interests in the trust estate and the income therefrom; (b) to change the trustees hereunder and the number thereof; (c) to modify the period of the trust; (d) to change the disposition of the trust fund at the expiration of the trust period; (e) to change the disposition of the trust fund in the event of the death of all the beneficiaries and their issue during the life of the donor; (f) to withdraw from this indenture of trust the power of the trustees to take, hold and dispose of hereunder any real property not theretofore acquired by them; (g) to modify the percentage of capital assets, or the principal of the trust fund, which, by the provisions of Article 3, the trustees are permitted to treat as income, and to modify or withdraw the discretion committed to the trustees touching the same. Nothing in this article contained shall be deemed to reserve in the donor any right or power to make him-

self a beneficiary hereunder nor to give him any benefit of this trust." The securities were handed over to the trustees, who accepted the same, and the income beneficiaries received the benefits. Congdon died on November 21, 1916, without having made any changes in the terms of the trust. For the purpose of the federal estate tax, plaintiffs were required to include in the gross estate, the entire trust property, on the theory that it came within Section 202 (b) of the statute, and that it was property "with respect to which the decedent had created a trust * * * intended to take effect in possession or enjoyment at or after his death." The plaintiff had also been required to include in gross estate the entire amount of the certificates of deposit issued by certain banks in 1913 and 1914, and payable to the order of the decedent and his wife, or either of them, or both, or the survivor. These certificates of deposit had, at all times, since their issuance, been in possession of the widow. The Commissioner also disallowed certain deductions claimed on the plaintiff's estate tax return for amounts expended by the executors for repairs and upkeep of buildings belonging to the estate and for fire insurance on such buildings.

Questions: (1) Was the transfer in question a trust intended to take effect in possession or enjoyment at or after death, so as to be required to be included in the gross estate?

(2) What part, if any, of the joint bank deposit was properly a part of the gross estate?

(3) Were the expenses paid by the executors proper deductions from the gross estate?

Decision: (1) "It would seem to be deducible from the authorities cited that the words 'take effect in possession or enjoyment at or after the death' of the donor include within their scope a postponement of complete possession or complete enjoyment, by reason of (a) a prior life estate in the donor; of (b) a prior estate in a third person during the life of the donor; of (c) a reserved power in the donor to defeat the substantial rights under the trust, coupled with a power of control over the management and disposition of the trust estate. * * * In determining what right of control and disposition the donor reserved to him-

self, it is proper to consider all of the reserved rights, together as well as separately. When this is done, it is hard to conceive any right of management, control or disposition which the donor did not have, except the right to make himself a beneficiary of the trust, and except, possibly, also the right to revest the property in himself, and even this latter result was possible under the terms of the trust instrument. These reserved rights in the donor, numerous, far-reaching, carefully-worded, together with the important fact that the donor was one of the trustees, the others being his wife and children, all indicate, unless they are meaningless, an intention on the part of the donor to retain during his lifetime control in management and power of final disposition of the property forming the trust estate. In other words, until the death of the donor, there is as was held in the matter of Dana Company, 215 New York 461, 'no element of finality' about the trust. At the death of the donor all of these reserved rights would of course cease. The status of the remaining trustees is then changed; they are freed from the control of the donor. The estate they hold is also freed from the right in the donor to change or destroy it. In other words, freed from what in effect was an encumbrance. Rights of the income beneficiaries also change character at the death of the donor,—their rights cease to be dependent upon the will and conduct of the donor, and become for the first time absolute in possession and enjoyment. And if at the death of the donor there be then alive any presumptive beneficiaries of the corpus of the estate, their contingent right becomes for the first time independent of the will and conduct of the donor. * * * In view of the rights reserved to the donor in the trust instrument, some of which are tantamount to a power of revocation, so far at least as the beneficiaries are concerned, others of which enable the donor to keep a firm hold on the management, control and disposition of the trust estate during his life, I am forced to the conclusion that the trust was one intended to take effect in possession or enjoyment at or after the death of the donor, and therefore within the provision of Section 202(b) of the Estate Tax Act."

(2) "There is a statute in the State of New York, Section 220 of the Tax Laws (Consolidated Laws, Chapter 60, subdivision 7), which reads as follows: * * * Under this statute it has been held that the property so deposited was taxable to the extent of one-half of its value 'on the theory that a joint owner of personal property may dispose of his own interest during his lifetime, and that the doctrine of survivorship applies only if the jointure is not thus severed, and that therefore the absolute ownership of the undivided one-half of the joint property which the deceased joint owner might have disposed of passed to the survivor upon his death and not until then. * * * That the surviving joint tenant has at all times been the owner of an undivided one-half interest, subject to the right of his co-tenant to take by survivorship, and that therefore that undivided interest was not taxable, but that the survivor succeeds to the absolute ownership of the other undivided one-half interest only by and upon the death of his co-tenant, and that therefore such interest is taxable.' In view of the similarity of the provisions of the New York statute and of the federal estate tax act, and in view of the foregoing construction of the New York statute given by its courts, I am of the opinion that one-half only of the funds represented by the certificates of deposit above mentioned should be included in the gross estate of Chester A. Congdon."

(3) "These expenditures were clearly authorized by Sections 7296 and 7298 General Statutes Minnesota, 1913. The items were included in the final account of the executors rendered to the probate court of St. Louis County, Minn., and were allowed by that court as proper items. * * * Section 203 of the Federal Estate Tax Act provides for deductions of 'administration expenses * * * and such other charges against the estate as are allowed by the laws of the jurisdiction.' I am clearly of the opinion that these two items should have been allowed as deductions from the gross estate."

COTHRAN & CONNALLY v. UNITED STATES

(U. S. District Court, W. D. Virginia, Oct. 6, 1921)
(276 Fed. 48)

Record: Revenue Act of 1918. This is a proceeding against the United States, brought under subsection 20 of Section 24, Judicial Code, and Sections 4, 5, 6, 7, and 10, of the Tucker Act (24 Stat. 505-507). The ground of action was that the petitioners had been required to pay, under duress and after protest, a special tax on brokers under Section 1001 (1) of the Revenue Act of 1918. Judgment for defendant.

Facts: Petitioners were engaged in the business of tobacco warehousemen. Leaf tobacco was brought by growers to the warehouse of petitioners where it was displayed for sale. Subject, usually, to right of rejection on the part of the grower, at prescribed times the warehousemen held auction sales of the tobacco. Petitioners had arranged with the principal manufacturers of tobacco to have buyers assemble at the warehouse for these sales. The highest bidder for each pile became the purchaser thereof, unless such bid was rejected. If the bid was not rejected, the warehousemen, promptly after the conclusion of the sale, paid the grower the bid price of the tobacco, less a commission. Later on the warehousemen collected the purchase price from the successful bidder. The buyers and sellers were not usually brought into personal contact; the seller looked to the warehousemen for his share of the selling price, and the warehousemen looked to the buyer to pay for the tobacco. Section 1001 (1) of the Revenue Act of 1918 provides as follows: ''Brokers shall pay $50. Every person whose business it is to negotiate purchases or sales of stock, bonds, exchange, boullion, coined money, bank notes, promissory notes, other securities, produce or merchandise, for others, shall be regarded as a broker * * *.''

Question: Were the petitioners ''brokers'' within the meaning of the statute and so subject to special tax?

Decision: ''Where a statute defines the meaning of a word it is clearly improper to seek to give such word a different meaning. The word 'broker' as used in subsection 1 of Section 1001 of

the Revenue Act of 1918 (40 Stat. 1057, 1126), is defined in this section. One of the common meanings of the word 'negotiate,' found in the Century Dictionary and in Webster's Dictionary, is 'to bring about by mutual arrangement.' The evidence in this case shows that the very essence of the business of the petitioners was to arrange that tobacco planters should bring their product to petitioners' warehouse to be sold at auction, and that tobacco buyers should attend such auction sales and bid for the tobacco. The petitioners clearly brought about sales of tobacco by mutual arrangement. * * *

"In this same subsection stock brokers are included. It is matter of common knowledge that the stockbroker, commissioned or directed to sell shares of stock, frequently, if not usually, gets the stock certificate (indorsed in blank) from the seller, and then finds a purchaser, and frequently the seller does not know who the purchaser is. So, also, in case a stock or bond broker is directed to buy. In all cases the stock or bond broker negotiates sales and purchases because he brings them about by mutual arrangement. It is true that in some brokerage businesses it is usual for the broker, as in real estate brokerage, to bring the buyer and seller together. But the definition of broker in this statute is much too comprehensive to make it permissible to restrict the word to cases in which the broker affects the sale by bringing the seller and buyer together." * * *

The fact that the Revenue Act of 1918 repealed Section 35 of the Act of August 5, 1909, which imposed a tax on dealers in leaf tobacco, and then inserted in subsection 1 of Section 1001 the words "produce or merchandise" seems to make quite clear the intent to subject tobacco warehousemen to the brokers' tax, in lieu of the former tax on dealers in leaf tobacco.

Accordingly, the court concluded that the petitioners were subject to the tax in question and entered judgment in favor of the defendant.

CURLEY, et al. v. TAIT, COLLECTOR

(U. S. District Court, D. Maryland, Nov. 29, 1921)

(276 Fed. 840)

Record: Revenue Act of 1916. Action by executors of the will of William H. Grafflin to recover federal estate tax paid under protest. On demurrer to declaration. Overruled. See also 276 Fed. 845, post.

Facts: The decedent, Grafflin, about seven and one-half years before his death transferred at different times various securities to either the Johns Hopkins Hospital or the Johns Hopkins University. As neither institution was, in the view of the Government, to get any substantial benefit from the property until after the testator's death, the defendant says that the transfers were not intended to take effect until that time and that, in consequence, the tax was properly collected. There were various minor differences in the forms of the transfers, but they were all alike, in that by each of them an out and out gift of the securities was made and consummated by the issue and delivery of new certificates in the name of the grantee. The Hospital, or the University, as the case might be, covenanted, in each of three agreements of transfer, that it would pay the net income during Grafflin's life to him, and after his death, during such time as his wife should survive him, to her. After both of them were gone, the income, as well as the principal, was to be applied to the use of the grantee. The remaining one of the four, was in the nature of a marriage settlement. It recited that Graffln was about to be married, and the Hospital, with whom this particular agreement was made, covenanted to pay, after the marriage was solemnized, the net income to the wife during her life, and afterwards to him during his life, if he should prove to be the survivor.

Questions: (1) Assuming that neither the University nor Hospital enjoyed their gifts during Grafflin's lifetime, and also assuming that the statute is retroactive and covers these transactions entered into years before it was enacted, was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage to the Hospital?

(2) Is the statute retroactive so as to include transfers which were all made before the statute was enacted?

Decision: (1) "If all beneficial ownership and possession irrevocably passes from the transferror at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death, and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, 'the interest' which he retained for himself." * * *

"The question of how such a contingent interest as Grafflin retained for himself under this agreement should be valued for estate tax purposes is not at all clear. Apparently what the statute had in mind in declaring that the value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, etc., is what it said, and no more. That is to say, the value of the property is to be then determined as of that date and not his interest in it; for, if the latter were the case, any property which had been transferred by him in such manner that his interest ceased at death would have no taxable value, and that is clearly what the statute does not mean."

(2) Upon the other question, that no tax at all was collectible because the transfers here in controversy were all made before the statute was enacted, the Government contends the statute itself declares that it has reference to a transfer made "at any time." The rule, of course, is that statutes are not to be given a retroactive construction when by doing so "antecedent rights are affected or human conduct given a consequence which it did not intend." This statute, if retroactively applied, will, in some instances cause serious hardship and injustice. If the Government's contention be sustained, the tax will come, not out of the sum received by the one to whom the tax property passes, but will

be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. It is easy to conceive of a case in which the taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to suppose it would be, and the Supreme Court has held that the courts will not assume that Congress intended any such consequences.

It was, therefore, held that the Act of 1916 did not affect transfers made before it was passed.

CURLEY et al. v. TAIT, COLLECTOR

(U. S. District Court, D. Maryland, Nov. 29, 1921)
(276 Fed. 845)

Record: Revenue Act of 1916. Action by executors of estate of Helen N. Grafflin, deceased, to recover federal estate tax paid under protest. On demurrer to declaration. Overruled. See, also, 276 Fed. 840, ante.

Facts: The plaintiffs, as executors, brought this suit to recover $3,443.07, which is the amount of estate tax the defendant exacted from them in excess of what they should have paid had the Maryland collateral inheritance tax of $58,759.44 been deducted before ascertaining the amount of the estate liable to the federal levy.

Question: Does the Maryland collateral inheritance tax attach to an estate before distribution?

Decision: If the inheritance tax in question does attach to the estate before distribution the plaintiffs were entitled to deduct the amount thereof before ascertaining the value of the estate liable to the federal tax. On the other hand, if the Maryland tax is upon the individual beneficiaries of the testatrix's bounty, the sum here in controversy was properly collected. The Circuit Court of Appeals for the Third Circuit has held that the Supreme Court of Pennsylvania has interpreted the statute of that state as imposing a tax upon the estate before distribution. Lederer, Collector v. Northern Trust Co., 262 Fed. 52. The General As-

sembly of Maryland in 1844 copied and enacted the Pennsylvania statute, making such changes in the verbiage, and apparently only such as were necessary to adapt it to the difference between the probate machinery of the two commonwealths.

It follows that, as the instant case, is ruled by Lederer v. Northern Trust Co., supra, defendant's demurrer to plaintiff's declaration must be overruled.

DAYTON BRASS CASTINGS CO. v. GILLIGAN, COLLECTOR

(U. S. Circuit Court of Appeals, Sixth Cir., Dec. 15, 1921)
(277 Fed. 227)

Record: War Munitions Act of September 8, 1916. Action to recover tax paid under protest. For case below see 267 Fed. 872, ante 168. Affirmed.

Facts: In May, 1915, the Canadian Car and Foundry Company had a contract for the sale of shrapnel shells to, or for the use of, the Russian Government, and had sublet, to a machine company at Dayton, a contract for making the fuses which were to be parts of the completed shells. The machine company then entered into a contract with the Dayton Brass Castings Company by which the castings company was to receive from the machine company brass ingots and put the same through its foundry, moulding the same into small castings, which were by the machine company to be united with other parts to complete a fuse. For this service the castings company was to receive a specified price per pound. This contract was carried on during the year 1916. By the provisions of the above named act, a tax was imposed upon every person manufacturing (among other things) "any part of" fuses, the tax to be 12½ per cent of the entire net profits actually received or accrued during the year "from the sale or disposition of such articles" manufactured within the United States.

Question: "The plaintiff's present contention is that the plaintiff did not receive profit 'from the sale or disposition of such articles,' but was in effect only paid for work and labor expended on the property of another."

Decision: While the plaintiff did not make a sale of the castings it is clear that it did make a disposition of these articles within the meaning of the statute. "Having received the metal and having cast it into form, plaintiff disposed of the castings and so far disposed of the subject-matter of the contract as to turn these articles over to the machine company and get its pay therefor. It cannot be questioned that what plaintiff did amounted to a 'disposition' of the articles within common dictionary definitions of that word. The substantial contention is that under the doctrine of ejusdem generis the statutory phrase can only include dispositions of the character of a sale. This rule may not prevail to the exclusion of the other rule which requires every word and phrase to be given force and meaning, if possible; and no reasonably probable course of conduct by manufacturers has occurred to us or been suggested by counsel which would not be a sale and yet would be the 'disposition' contemplated by this statute, if this conduct by this plaintiff should not so be named. * * * Every reason which would justify taxing a sale seems to justify a tax reaching this 'disposition,' and Congress could not well have chosen a more completely inclusive term."

DAYTON BRONZE BEARING CO. v. GILLIGAN, COLLECTOR

(U. S. Circuit Court of Appeals, Sixth Cir., June 6, 1922)
(281 Fed. 709)

Record: R. S. 3176 as amended by Revenue Act of 1916. Action to recover penalty alleged to have been illegally collected. In error to U. S. District Court, Northern District, Ohio, which rendered judgment for the plaintiff. Judgment affirmed.

Facts: Pursuant to a contract entered into between the Dayton Bronze Bearing Co. plaintiff herein, and the Recording & Computing Machine Co., the plaintiff agreed to mold material furnished and owned by the Recording Co. into certain rough and preliminary forms, in which forms they were to be returned to the Recording company as castings. These castings were in turn used by the Recording company in the manufacture of fuses to be attached to shells manufactured by other persons or corporations for the use of the Russian Government. The plaintiff believed in good faith that

it was not manufacturing munitions and not liable to the payment of any tax under the Munitions Tax Act of December 8, 1916, and for this reason, it failed to make and file a return within the time prescribed by law. It further appeared that the plaintiff had been advised by reputable counsel that under the facts stated it was not liable for the payment of this tax. On July 2, 1917, a revenue agent called at the office of the plaintiff and requested it to file with the Collector a return covering its profits under the contract above mentioned. Since the plaintiff objected to doing this, and still insisted that it was not liable for the payment of this tax, the collector of internal revenue advised that a return be filed under protest without prejudice to the company's rights, and acting upon this advice, the plaintiff did, on the 13th day of July, 1917, file such report with the collector and thereupon the Commissioner, on August 23, 1917, assessed a tax against the company, together with 50% penalty for failure to file the same the 1st day of March, 1917, as required by law. The liability for the tax is not questioned, this point having been settled by the case of Dayton Brass Castings Co. v. Gilligan, 267 Fed. 872, ante 168, which case did not, however, involve the 50% penalty here sought to be recovered, for the reason that the collector voluntarily returned the penalty assessed and collected in that case to the plaintiff before the commencement of that action.

Questions: (1) Was the failure of the plaintiff to file a return within the time prescribed by law "due to a reasonable cause and not to wilful neglect," within the meaning of the exception in Section 3176 R. S. as amended by the Revenue Act of 1916, so as not to be liable for the 50% penalty provided for in that Section?

(2) Was the return filed 'voluntarily and without notice from the collector' within the meaning of the clause in Section 3176 providing for exemption from liability for the 50% penalty?

(3) What weight is to be given to the fact that a penalty collected in a similar case was voluntarily returned by the collector?

Decision: (1) "The attendant and surrounding circumstances of this case have no tendency whatever to cast a doubt or suspicion upon the good faith of the taxpayer. While the fact that it sought and obtained legal advice, in and of itself, might not be

sufficient to excuse its failure to file this return, nevertheless it tends to show that the taxpayer was acting in good faith and availed itself of the best means at its command to determine, honestly and fairly, the question of its liability. * * * It would therefore appear that the officers of this company were honestly mistaken as to its liability to pay this tax and that under the order of the Treasury Department above referred to [O. 818, 3-19-204, 1919 Cum. Bull. p. 247] in the absence of circumstances having a tendency to cast doubt and suspicion upon its good faith, its ignorance of its liability to pay this tax is sufficient to constitute a reasonable cause for failure to make and file a return within the time prescribed by law."

(2) "Counsel has not called our attention to any statute providing for a notice to the taxpayer to file a return, nor does there appear to be any statutory provision for a notice of this character except as found in Section 3173 R. S. or in Section 306 of the Munitions Act of 1916. * * * No such notice as provided in either of these sections was given the Dayton Bronze Bearing Co. by the collector or deputy collector. While the petition avers that the plaintiff was notified by an agent of the internal revenue department to file a return with the collector, nevertheless the evidence and stipulation in reference thereto are to the effect that the agent of the Internal Revenue Department, in discharge of the duties imposed upon him by Section 3173 R. S. called at the place of business of the taxpayer for the annual list or return, at which time the question of the company's liability was freely and frankly discussed by the officers of the company and the agent of the Internal Revenue Department with a view to the determination of the best, quickest and fairest means of settling the question of the company's liability. Shortly following this, the taxpayer, pursuant to the advice of the collector, filed a voluntary return. * * * As a practical matter, where there has been no substantial delinquency but only a technical violation of the statute, and where the negligence of the taxpayer was not intentional, such cases have been compromised by the payment of nominal penalties such as $5 by individuals and $10 by corporations."

(3) "The construction given this statute by the collector when he returned this penalty to the Dayton Brass Castings Company was based upon the same state of facts established by the evidence in this case. While the presumption that the Department charged with the execution of a law has properly interpreted it, may be strengthened in proportion to the time such construction has obtained; nevertheless, a construction of a statute by the Department charged with the enforcement thereof should be given due consideration regardless of the length of time such construction has been adopted and enforced by that Department."

DETROIT HOTEL CO. v. BRADY, COLLECTOR

(U. S. District Court, E. D. Michigan, S. D., October 25, 1921)
(275 Fed. 995)

Record: Act of August 5, 1909. Action in assumpsit to recover from the defendant, as collector of internal revenue, the amount of certain taxes, paid, under protest, to his predecessor in office by the plaintiff corporation. Judgment for defendant.

Facts: The plaintiff corporation was organized under the laws of Michigan: "To purchase suitable land in the city of Detroit, Michigan, and construct thereon a modern fireproof hotel and to operate, manage or lease, mortgage or sell the same." The corporation secured the land, built the hotel and leased the same to another corporation which operated it. The rental was payable in monthly installments "at the office of" the plaintiff and the amount of such rent was dependent upon the extent of the lessee's profits from the operation of the hotel. The lease gave the plaintiff the right to inspect the books and accounts of the lessee at all reasonable times. Later the plaintiff added five stories to the hotel and negotiated loans for this purpose, secured by mortgages on the property, and thereupon entered into a new lease with the operating company at an increased rental. The plaintiff filed the annual report required by the Michigan statutes. Aside from the foregoing, the activities of the plaintiff corporation during the years covered by the tax in question were "only such as were incident to the receipt of rents from the lessee and distributing the same for interest charges and as dividends."

Questions: (1) Was the plaintiff "carrying on or doing business" within the meaning of the Act of August 5, 1909?

(2) If the taxes in question were improperly exacted by the predecessor in office of the defendant collector, can they be recovered from the defendant in this action?

Decision: (1) "I am satisfied that the acts and activities of the plaintiff during the years mentioned constituted "the carrying on or doing business by such corporation," within the meaning of Section 38 of the Corporation Excise Tax Act, and that therefore the taxes in question were properly assessed and paid."

(2) "While the defendant is in the pleadings herein designated as collector of internal revenue, it is clear, as is indicated by the language of the declaration hereinbefore quoted, that this action is brought against him personally, to recover from him money alleged to have been wrongfully received by him from plaintiff, giving rise to an obligation on his part to repay such money to the plaintiff. * * * Defendant, however, never having received any of these taxes, can not, under any statutory provision or theory of law known to this court, be required to pay the amount thereof to the plaintiff in the present action. * * * Various statutory provisions are invoked and discussed by plaintiff in support of its contentions to the effect that its 'complaint is really against the United States official, in substance against the United States, and the personal element is eliminated.' No statute, however, is referred to, and I know of none, which provides for a recovery from one collector of internal revenue, in an action in assumpsit brought against him, of taxes not paid to, nor received by, him, at least where an action has not been first properly brought against the collector receiving the taxes and thereafter duly revived against his successor in office. The absence of any such statute is, of course, fatal to recovery upon the theory thus advanced."

DOLL v. EVANS et al.

(U. S. Circuit Court, E. D. Pennsylvania, April 1, 1872)
(Fed. Case No. 3969)

Record: Act of June 30, 1864. Action to recover tax paid. Demurrer to plea. Judgment upon the demurrer, for the defendants.

Facts: Plaintiff made a return of his income for the year 1868 and paid an income tax of $95.60. Within the 15 months thereafter provided by the statute, the assessor notified the plaintiff to appear and produce his books of account, and, when this was not done, assessed an additional tax of $482.64 plus a one hundred per cent penalty of $482.84, and the total amount of $965.68 was collected from plaintiff by distraint.

Questions: (1) Has an assessor of internal revenue power to re-assess the income tax of a citizen, who has paid the tax first assessed against him?

(2) Is the act of Congress which imposes an addition of one hundred per centum to the tax as a penalty for the "return of a false or fraudulent list or valuation" constitutional?

Decision: (1) "Now, at any time within fifteen months after the annual list is delivered to the collector a reassessment may be made, and only the additional tax thus ascertained is to be charged and put on another list called the 'monthly list.' By this extension of the period for reassessment beyond the time when the original tax must be paid, and the provisions for the collection of the additional tax only upon the monthly list it is apparent that the assessor's power of re-assessment is to be exercised independently of the fact of the payment or non-payment of the tax charged in the annual list. It follows, therefore, that the additional tax assessed upon the plaintiff was authorized by the act of Congress."

(2) The validity of an appraisement and an additional duty imposed under the customs laws has been sustained by the Supreme Court, despite the fact that the powers exercised by the appraisers were, beyond question, judicial in their nature. "Their conclusion is a most expressive affirmance of the validity of such legislation. So, also, in the present cases the investiture of the assessor with analogous functions must be sustained, as auxiliary to the execution of the same constitutional grant of power to Congress."

DUGAN et al. v. MILES, COLLECTOR
(U. S. District Court, D. Maryland, Dec. 1, 1921)
(276 Fed. 401)

Record: At Law. Action to recover part of federal estate tax paid. On demurrer to the declaration. Sustained in part.

Facts: The decedent, after bequeathing certain taxable legacies which were not involved in this case, left all the rest of his estate to trustees, during the life of his widow. The trustees were to accumulate the income thereon, were to pay her an annuity of $25,000 during her life, and at her death, after applying $250,000 to such uses as she might by will appoint, they were to turn all of the rest of his estate over to three corporations, legacies and devises to every one of which are exempt from the estate tax. All, therefore, that can be taxable is what the widow is either to receive or dispose of. Further facts are given in the Decision below.

Questions: See Decision below.

Decision: (1) "The defendant has insisted on collecting the estate duty on the value of the annuity, computed at $165,325.25, and upon the full quarter of a million over which the widow is given power of testamentary appointment. That is to say, the estate has been required to pay upon $415,325.25. It is clear that this sum largely exceeds the present value of everything which will in any sense ever go to the widow, and that therefore something has been taxed which Congress intended to exempt.

"Apparently in calculating the present value of the annuity, the treasury assumed money to be worth 4% and that rate will be used for illustrative purposes. Any other will do as well. At it, the $250,000, over which the widow has the power of testamentary appointment, will, while the trustees hold it, produce $10,000 per annum and to make up her full annuity $15,000 will have to be supplied by other portions of the estate, and that is all that will come from other sources. The present worth of an annuity of $15,000 is, of course, just three-fifths of one of $25,000, or, at the rate assumed, $99,195.15. It is therefore demonstrable that using the assumed rate of interest, everything the widow gets is $250,000 plus $99,195.15, or, $349,195.15, and that is all that should be taxable, if full effect is to be given the will of Congress."

(2) "The declaration contains four counts to each of which the defendant has demurred. The first recites such of the provisions of the will as require the trustees to accumulate the income of the estate during the widow's life, and the fact that all such accumulations after her death go to the exempt corporations. From what

has been said, it is apparent that this count discloses a cause of action not indeed to recover the tax on all the $250,000, but on so much of it as is levied upon the difference between $250,000 presently demandable, and the same sum, payable without interest after the death of the widow.''

(3) ''The Government further objects that the appeal to the Commissioner made no reference to the annuity, and did ask him to refund the entire tax on the $250,000. Even so, all the facts necessary to bring to his attention plaintiff's right to a part of it were disclosed, and if the time in which a new appeal could be taken had expired, I should have little difficulty in holding that in this respect the count was good.''

(4) ''The Government contends that the declaration does not, in any of its counts, sufficiently allege that the payment was made under duress. Of course, everybody knows that the only reason the money was paid was because the collector insisted that it should be. The Government apparently, however, feels that a bad precedent would be established if it did not require the plaintiff to say, in so many words, that they paid only under compulsion. As that request can be so easily complied with, there is no reason why the Government's wishes should not be met; but as that has not as yet been done, the demurrer to the first count will be sustained.''

(5) ''The theory of the second count appears to be that the utmost that the Government was entitled to levy upon was $250,000, and that having assessed the annuity at $165,325.25, all that remained to be taxed was the difference between it and $250,000, or $84,674.75. I do not think this is true, or even partly true, and the demurrer to this count will be sustained.''

DU PONT v. GRAHAM, COLLECTOR

(U. S. District Court, D. of Del., June 13, 1922)
(Not yet reported)

Record: Income Tax Act of 1913, Revenue Act of 1921, and R. S. Sec. 3224. In equity. Suit to restrain the defendant from proceeding to collect an additional income tax assessed against the plaintiff for 1916 by distraint. Injunction granted.

Facts: On September 30, 1915, the plaintiff was the owner of 37,767 shares of the common stock of the E. I. Du Pont de Nemours Powder Co., a New Jersey Company. On October 1, 1915, the New Jersey Company transferred its assets to E. I. Du Pont de Nemours & Company, a Delaware corporation. As part of the plan of reorganization, each stockholder of the New Jersey Company received two shares of the common stock of the Delaware Company for share of common stock held in the New Jersey Company. The plaintiff received on October 1, 1915, a total of 75,534 shares of the common stock of the Delaware Company. On February 19, 1916, the plaintiff filed his income tax return under the Act of October 3, 1913, and on March 4, 1916, filed an amended return of his income. The plaintiff did not, however, return nor pay tax upon the said stock dividend as part of his income. On January 1, 1920, the plaintiff received through the mails a notice and demand dated December 1, 1919, that he pay to the defendant as collector the sum of $1,576,015.86 for income tax for the year 1915. This assessment was not made earlier than December, 1919, and it was made as a result of an amended return prepared by the Commissioner not earlier than July 22, 1919. It was conceded that the stock dividend upon which it is attempted to hold the defendant liable had been held by the Supreme Court to be taxable income. U. S. v. Phellis, 260, October Term, 1921, post.

Questions: (1) Was the amended return and assessment made by the Commissioner invalid, in that they were not made within the time stipulated by Section E of the Act of 1913, which provides that in cases of refusal or neglect to make a return and in cases of false or fraudulent returns, the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within the three years after such return is due, make a return upon information obtained as provided for in this section or by existing law?

(2) If the return and assessment are invalid, will the court enjoin the defendant from proceeding to collect the amount of the assessment by distraint?

(3) Does R. S. Sec. 3224, prohibiting suits for the purpose of restraining assessment or collection of any tax, deny relief by injunction in a case where the taxpayer, if forced to pay the tax by

distraint, would have no recourse at law, due to the fact that the period within which a claim for refund may be filed has expired?

Decision: (1) "Section E of the Income Tax Act of 1913, 38 Stat. at Large 169, after providing for assessment and notice before June 1 of each successive year and that assessment shall be paid on or before June 30, provides that in case of refusal or neglect to make such return and cases of false or fraudulent returns, the Commissioner 'shall upon the discovery thereof, at any time within three years after the return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment.' * * * The question as to whether the three years within which a return may be made runs from the time of the discovery or from the time when the return is due has been held against the plaintiff in a dictum in Elliott National Bank v. Gill, 218 Fed. 600, but the point was not expressly before the court either in that case or in Woods v. Lewellyn, 252 Fed. 106, where the inference is to the contrary. The subject is discussed in Montgomery's Tax Procedure, Ed. 1921, page 170, footnote 18, and the opinion of the author is that the punctuation conveys a very clear meaning that the discovery and the assessment must be made within three years from the time when the return is due."

(2) "These considerations, however, all go to the question of the invalidity of the return and assessment and cannot be raised in this proceeding in view of the inhibition of Section 3224 R. S. providing: 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,' and the rulings of the Supreme Court holding that Congress 'has provided a complete system of corrective justice in regard to all taxes imposed by the general government, including provisions for recovering the tax after it has been paid, by suit against the collector, and therefore the taxpayer has no recourse to the courts until after the money is paid.' * * * Therefore, it must be held that the remedy by injunction will not lie, unless because the plaintiff through the threatened action of the collector to collect through distraint is

deprived of any redress at law, the effect of Section 3224 upon the facts of this case has been modified by subsequent legislation.''

(3) ''By the Revenue Act of November 23, 1921, Section 250 (d) Statutes at Large, page 265, it is provided: 'No suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war tax acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed,' etc. As the plaintiff's return was filed in March, 1916, I see no escape from the conclusion that the above provisions of the Act of 1921 interposes a limitation upon suits or proceedings which expired in 1921.''

The court then pointed out that by the provisions of Sections 252 of the Revenue Act of 1918, re-enacted as Section 252 of the Revenue Act of 1921, no claim for credit or refund of taxes paid in excess of that properly due could be allowed or made after five years from the date when the return was due unless before the expiration of such five years a claim therefor is filed by the taxpayer. ''As the five years from the date when the return was due, namely, March, 1916, has long since expired, the plain meaning of the above section is that no credit or refund could now be lawfully allowed or made because no claim therefor was filed by the plaintiff within the five years. * * * If the plaintiff pays the amount demanded, no remedy at law is left open to him for the recovery of such excess.''

''While Section 3224 has been strictly construed in view of the remedial system providing for remedies of the taxpayer against the imposition of illegal taxes following Mr. Justice Blatchford's comprehensive discussion of the subject in Snyder v. Marks, 109 U. S. 189, Congress has since added to the system the limitations contained in the Act of 1921 and reading these new provisions in connection with Section 3224, I cannot conceive that Congress intended the taxpayer to be rigidly held to the inhibitions of Section 3224 if the effect should be to nullify the inhibitions against the officers of the revenue contained in the later statutes and thus to subject the taxpayer to proceedings by distraint without leaving him an ade-

quate remedy at law, after the limitation had run against the collector's right to begin such proceedings.''

''A preliminary injunction may issue restraining the defendant from proceeding by distraint or attempting to collect by distraint the taxes claimed, without, however, including therein restraint against collection by suit.''

ELIASBERG BROS. MERCANTILE CO. v. GRIMES

(Supreme Court of Alabama, April 24th, 1920)
(86 So. 56)

Record: Alabama Revenue Act of 1919 and Sec. 214, Constitution of Alabama. Bill to restrain Eliasberg Bros. Mercantile Co. from certifying to the state tax officials the salary earned by Grimes as an employee of respondent. From a decree granting the relief prayed, respondents appeal. Affirmed.

Facts: The Revenue Act of 1919 provided for a graduated tax of from 2 to 4 per cent, on incomes. Section 214 of the Constitution of Alabama provided that ''the Legislature shall not have the power to levy in any one year a greater rate of taxation than sixty-five one-hundredths of one per centum on the value of the taxable property within this state.''

Questions: (1) Is income ''property'' in the ordinary legal sense of the word?

(2) If so, is it embraced within the meaning of the word ''property'' as used in the constitutional limitation?

(3) Is the graduated tax in violation of the constitutional limitation?

(4) If so, does the invalidity of part of the income tax provisions render the whole act void?

Decision: (1) ''Money or any other thing of value, acquired as gain or profit from capital or labor, is property; in the aggregate, these acquisitions constitute income; and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property, and therefore is itself property.''

(2) "The language which we have quoted from the opinions in the three cases supra exhibits, we think, a settled consensus of judicial understanding that the term 'property,' or 'taxable property,' includes all property capable of ownership whose value can be accurately determined, and that incomes are such property. Those opinions were published in the official reports, and we must presume that they were known and understood by the profession and by the members of the Constitutional Convention of 1901."

(3) "It is not suggested that the tax laid on incomes by our Revenue Act of 1919 is an occupation or a business or a privilege tax, or that it is anything but an income tax in the comprehensive sense in which it has been heretofore defined and considered. It must therefore, be held to be a direct imposition upon 'property' as such, as that term is used in Section 214 of the Constitution of Alabama; and, being in excess of the maximum rate of 65/100 of 1 per cent therein prescribed, it is plainly and beyond any reasonable doubt offensive to that limitation, and its provisions must, in accordance with our bounden duty in the premises, be pronounced null and void."

(4) "It is the view of the Chief Justice that the income provision, although void as to its levy in excess of 65/100 of 1 per centum, may nevertheless be upheld as a valid levy pro tanto. In our desire to avoid the complete nullification of this important legislative provision, we have given serious and anxious consideration to that suggestion. * * * We have, however, reached the conclusion that to declare it law in that amended form would be in effect nothing less than judicial legislation, and would be a dangerous departure from the settled rules that govern courts in respect to such legislation."

FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. UNITED STATES

(U. S. Supreme Court, May 29, 1922)

(Not yet reported)

Record: Act of June 13, 1898. Action to recover taxes paid. Appeal from the decision of the Court of Claims dismissing plaintiff's petition. Motion to remand granted, with direction to make

new findings of fact as prayed and modify the judgment, if need be, to conform to this opinion.

Facts: All the money derived from the sale of the capital stock of the plaintiff corporation and all the money of the surplus were permanently invested in real estate (including the office building at Baltimore in which the company's business was done) and in bonds, stocks, and other securities. These investments were referred to and were designated on its books as "Capital Stock Investments." The securities and valuable papers representing them were segregated in a separate compartment of the company's vault in separate envelopes ear-marked as capital stock. The financial operations concerning them were kept in a separate set of books distinct from the record of all other business transacted by the company. In addition to the banking business, the plaintiff was engaged also in the surety business, the safe deposit business, and the business of acting as trustee under the bonds issued of other corporations. The business of the banking department was likewise kept separate, physically and as a matter of accounting, from all other business of the company. The records of its operations were kept in a distinct set of books. The moneys received from deposits (which in 1901 exceeded $4,000,000) were invested in stocks and bonds which were kept in the vault in separate envelopes ear-marked as such. The expenses of each department of the company's business were charged to the separate accounts of that department payable out of its earnings but physically, expenses of the several departments may have been paid from a common fund. A part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositaries. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising the total amount was recorded in the respective books of each department. The earnings of each department were carried to the undivided profits account of the company at the end of each year. A portion of the office building was occupied by the banking department. The sum of $8,300 was paid as special taxes for the years 1898 to 1901,

under Section 2 of the Act of June 13, 1898. The company applied on November 22, 1913, for a refund, alleging that the taxes had been assessed and collected on plaintiff's capital, but that in fact none of it had been used or employed in the banking business. The application was rejected by the Secretary of the Treasury on April 19, 1917; and this suit was begun on July 25, 1918.

Questions: (1) Was this action barred by the statute of limitations?

(2) Was the plaintiff corporation using or employing its capital in the banking business, within the meaning of the Act of 1898?

(3) If so, how should the amount of the tax be arrived at, in view of the fact that the plaintiff was also engaged in other lines of business?

Decision: (1) "The contention is that the cause of action accrued on May 21, 1914, which is six months after presentation of the claim to the Commissioner of Internal Revenue; that the two-year statute of limitations prescribed by Section 3227 of the Revised Statutes applies; that the fact that the claim was not rejected by the Treasury Department until April, 1917, is immaterial, and that therefore the suit, which was begun in July, 1918, is barred. This was the view taken by the Court of Claims for reasons theretofore given in Kahn v. United States (55 Ct. Cls. 271). But, as we held in Sage v. United States (250 U. S. 33, 39), the six-year statute of limitations applies to cases arising under the Act of July 27, 1912 (Chapter 256)."

(2) "The company claimed that it had not used any of its capital in banking during any of those years; and duly requested the lower court to find as facts that: 'The entire business of the banking department was conducted solely on its depositors' money. Neither the capital stock nor surplus of plaintiff company was used or employed by or in the banking department.' The court made no specific finding on that subject * * *. The Government contends that the findings requested are immaterial, because, as a matter of law, all of the capital (and surplus) was used or employed in banking. * * * In other words, the contention is that the Act fixes the tax upon the banker 'using or employing'

a capital; and that a firm, or company, being a banker, can not escape, or reduce, the tax by showing that it is engaged in several lines of business and that, in fact, none, or only a part, of its capital was used specifically in its banking operations. * * * We can not, on these findings of fact, say, as matters of law, that all the capital of the Fidelity Company was used in the banking business; nor can we say that at least the amount upon which the tax was assessed (which in no year was as much as one-half the company's capital) was so used. Capital may be employed in banking although it is not used strictly as working capital and none of it is used in making loans or directly in other banking transactions. Money of a banker held in the vault or with depositaries as a reserve is employed in banking as much as money loaned to customers. Capital invested in securities may be employed in banking even if its sole use is to give to the banker the credit which attracts depositors or to make it possible for him otherwise to raise money with which banking operations are conducted. And if such securities serve to give credit, they will continue, also in the legal sense, to be capital used in the banking business, even if they are designated by the company as assets of another department and physically segregated as such. * * * On the facts found by the Court of Claims we are unable to say that no part of the capital was used in the banking business or that there was used at least as much thereof as was represented by the taxes assessed. It follows that in order to determine what sums, if any, are recoverable, additional facts must be found. The request for further findings made by appellant was appropriate, and the case should be remanded with directions to make such findings * * *."

(3) "If a company is engaged exclusively in banking, all of its capital, however invested, may reasonably be held to be capital employed in banking without inquiry into the particular use to which it is put. * * * But where a company is lawfully engaged in several distinct businesses to the successful conduct of each of which credit is necessary, and the company's capital supplies such credit to each, the whole of this common capital cannot be deemed capital of a single department. Under such circumstances charges incident to common capital are, in accounting prac-

tice, apportioned ordinarily among the several departments; and it may not be assumed that Congress in laying this tax intended to depart from the usage of business.''

FIDELITY TITLE & TRUST CO. v. UNITED STATES

(U. S. Supreme Court, May 29, 1922)
(Not yet reported)

Record: Act of June 13, 1898. Action to recover tax paid. Appeal from decision of the U. S. Court of Claims rendering judgment for the defendant. Judgment affirmed.

Facts: The plaintiff corporation carried on five classes of business, one of which was banking. An amount in excess of its capital was permanently invested in bonds and real estate, the latter including its office building. A schedule of these investments was carried on the books designated ''schedule of investments of the capital stock of $1,000,000''; but there was no physical segregation of these assets from others belonging to the company. Nor was there segregation of the money received from the capital stock or from investments made therewith from the money derived from earnings of the several departments. No attempt was made to segregate or earmark investments as having been made for any particular department. All moneys received by the company, including bank deposits, were commingled, and from these general funds all investments were made and all expenses and losses were paid. The office building was used by all the departments. All the earnings from the several departments were pooled and went into the profit and loss account. There was carried in this account a credit representing undivided profits amounting in 1898 to $414,-468.86, which increased from year to year and was $948,074.56 in 1902. These undivided profits were not at any time during the period in question set apart in any way as a separate fund, and they were at all times subject to distribution by the Board of Directors as dividends and available for any department of the business. At a date subsequent to the period here in question additional stock was sold above par to form a surplus fund. The sum of $10,028.94 was assessed against the plaintiff upon its whole capital and undivided profits and paid as bankers special taxes

under Section 2 of the Spanish War Revenue Act. This action was brought for the recovery of the amount so paid.

Questions: (1) Was this suit, brought in July, 1918, barred by the two-year statute of limitations, because the application for refund had been made in November, 1913?

(2) Was the plaintiff's capital or undivided profits used or employed in banking within the meaning of the statute?

(3) Were the plaintiff's undivided profits a part of its capital within the meaning of the Act, and so subject to the tax?

(4) Does the statute draw a distinction between surplus and undivided profits?

Decision: (1) "In the main, the facts are similar to, and the questions of law are the same as, those considered in Fidelity & Deposit Co. v. United States, decided this day. For the reasons there stated we hold that the action was not barred."

(2) "The burden lay on the plaintiff to establish that none of the company's capital, or that less of it than the amount for which it was assessed, had been used or employed in the banking department. It failed entirely to sustain that burden. The proportions of capital and accumulated profits used in the respective departments were not established by the evidence. There was no finding that the net profits of the banking department were received solely from the use of depositors' money. And there does not appear to have been any request for a finding of fact that no part of the capital and undivided profits was used in banking; or for a finding of facts from which the proportion so used, if any, could be determined. Therefore the Court of Claims properly denied recovery for any part of the taxes paid, unless we can say, as matter of law, that undivided profits, on which, for the years 1898 and 1901 taxes were assessed as upon capital, were not assessable as such."

(3) "The Act declares that 'in estimating capital, surplus shall be included' and that the 'annual tax shall in all cases be computed on the basis of the capital and surplus for the preceding fiscal year.' The Act does not mention undivided profits. The question is whether Congress intended to draw a distinction between surplus and undivided profits; or intended that all capital

actually used in banking should be taxed, whether it was strictly capital stock, or surplus, or undivided profits. The company argues that while the word 'surplus' in its general and popular meaning, includes undivided profits, Congress, in the Act of June 13, 1898, used the term in its technical and restricted sense of a fund formally set apart and called surplus by the authorized officers of the bank; and that, as matter of law, no tax can be assessed on undivided profits. This view finds support in opinions of the Attorney General rendered in 1899 and 1900. (22 Ops. Atty. Gen. 320; 23 Ops. Atty. Gen. 341.) But his rulings were not acquiesced in by the Treasury Department. It recommended promptly an amendment of the Act which should expressly declare that undivided profits were to be considered surplus, Annual Reports of the Commissioner of Internal Revenue (1899, p. 91) (1900, p. 89); and it submitted the question thereafter to the courts for determination. In Leather Manufacturers' National Bank v. Treat (116 Fed. 774) (1902), the District Court held that undivided profits were subject to taxation; and the judgment in that case was affirmed by the Circuit Court of Appeals for the Second Circuit (128 Fed. 262) (1904). With these courts we agree."

(4) "By the Act of 1898, Congress imposed the tax, not on incorporated banks only, but also on any person, firm, or company engaged in banking. And it measured the tax by the amount of capital actually used or employed in banking. The technical distinction between capital, surplus, and undivided profits is obviously not applicable to the banking business when conducted by individuals or firms, and the distinction between surplus and undivided profits, while commonly observed by incorporated banks, is not ordinarily made by other business corporations. As it is the use or employment of capital in banking, not mere possession thereof by the banker, which determines the amount of the tax, the fact that a portion of the capital so used or employed is designated 'undivided profits' is of no legal significance."

FIDELITY TRUST CO. v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Penn., July 14, 1921)
(276 Fed. 51)

Record: Revenue Act of 1918. Action to recover amount of stamp tax paid under protest. Sur rule for judgment. Rule discharged.

Facts: The Revenue Act of 1918 imposes a stamp tax "on all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents." The Government compelled the plaintiff in this case to pay a stamp tax on certain certificates known as "car trust certificates." These certificates are described by the court as follows: "They are called for because some railroad or other transportation company is in need of rolling stock or other equipment, and is without funds or credit with which to supply itself, and there is a legal or other difficulty in the way of a direct pledge of the property. They are issued under a number of different plans. The one with which we are concerned is known as the Philadelphia plan. Those willing to share in the venture are invited to place their contributions in the hands of an acceptable trustee. The rolling stock, or other property, is then purchased in the name of this trustee as owner. The trustee then enters into a form of bailment or conditional sale agreement with the carrier, the periodical and final payments upon which are sufficient to pay the interest on the investment and the principal at maturity. The contributors in the meantime hold the certificates or acknowledgment of the trustee of their respective shares in the venture."

Question: Are car trust certificates, described as above, issued under the Philadelphia plan, subject to the stamp tax imposed under the Revenue Act of 1918?

Decision: A certificate of the kind involved here not being "a certificate of indebtedness issued by any person," nor "an instrument issued by any corporation," would be exempt if the taxing hand has been laid only upon these specific forms of what are

generally known as securities. "The Act of Congress, however. includes more than the two kinds of securities mentioned above, because we think it includes everything 'known generally as corporate securities.' That these trust certificates are so known would not be denied." * * *

"The real truth back of the whole discussion is that, if these securities are not taxable, it is because of the accidental circumstance of a wholly nominal separation of the security held by the taxpayer from the obligation of debt entered into by the carrier corporation. The real security is the promise, not of one corporation, but of two, to pay to the certificate holders the sum due them. The real transaction is the request of the carrier company made to the certificate holders to advance the money required for equipment, in consideration of which the carrier agrees to pay back the sum advanced, with interest. * * * It is, however and none the less, true that, if for any reason Congress has not included these certificates, no tax can be imposed. The impression of this effect made by the argument at bar has been removed by what seems to us to be the sufficiently expressed will of Congress to tax them."

FONTENOT, COLLECTOR v. ACCARDO
WITH FOUR OTHER SIMILAR CASES

(U. S. Circuit Court of Appeals, Fifth Cir., Feb. 15, 1922)
(278 Fed. 871)

Record: National Prohibition Act and Rev. Stat. Sec. 3224. Bills in equity to enforce collection of taxes and penalties. From decrees in favor of plaintiff (269 Fed. 447, ante 222) defendants appeal. Affirmed.

Facts: The object of the suits was to prevent by injunction the collection by distraint of certain assessments levied under section 35 of the National Prohibition Act. This section provides for a tax in double the amount formerly provided by law, with additional penalties, against persons responsible for the illegal manufacture or sale of intoxicating liquor. In all of the cases motions to dismiss were made on the ground that the court was without jurisdiction because of Rev. Stat. Sec. 3224, which prohibits suits for the purpose of restraining the assessment and collection of a tax.

Question: Is the assessment authorized by section 35 of the National Prohibition Act a tax or a penalty?

Decision: "None of the bills averred a tender of the so-called 'tax,' as distinguished from the additional 'penalty,' and it may be assumed that the bills should have been dismissed if any part of an assessment authorized by the above-quoted section is in reality an assessment of a tax."

If section 35 authorizes a tax assessment, the collection of the tax may not be enjoined; but if it authorizes a penalty assessment, section 3224 is inapplicable and injunction may issue upon proper showing for relief.

"While under the revenue laws one claimed to be liable had no means of preventing the Government from collecting a tax imposed upon him, yet it was provided by section 3226 that he could recover back by suit a tax illegally assessed and collected. But it is not contemplated by any provision of law that one who is forced to pay any illegal penalty can recover it back by suit. Nor is it the law that a penalty as such is collectible by distraint proceedings. Section 3213 (Comp. St. 5937) makes it the duty of the collectors to sue for the collection of penalties and forfeitures, and opportunity is thus afforded for a hearing and defense.

"The fact that section 35 of the Act does not provide for notice is persuasive that it was intended to assess penalties, to be enforced in the usual way by fine or by suit. If it had been intended to assess taxes, no doubt a requirement of notice before distraint, levy, and sale would have been provided in order to give opportunity to be heard.

"We are of opinion that the assessments involved in these cases were assessments of penalties and are not collectible by distraint proceedings. Of course, the collection of penalties can be enforced by the methods and proceedings authorized by law."

FOX v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, Feb. 24, 1922)

(280 Fed. 413)

Record: Revenue Act of 1918. Action to recover taxes paid. Defendant's demurrer sustained and complaint dismissed. Affirmed on rehearing.

Facts: The money for the recovery of which suit was brought was paid voluntarily in March, 1919, as a part of the plaintiff's income tax for the year 1918. The item of loss upon account of which plaintiff claimed a refund was not called to the attention of any Government official prior to March, 1921.

Question: May a tax paid voluntarily and without protest be recovered by suit?

Decision: The original tax having been transmitted to the Government without protest or complaint upon the part of the plaintiff, as against the Collector there could be no recovery at common law nor under the Statutes relating to him or to his office. There is nothing in Section 252 of the Revenue Act of 1918 which would relieve the plaintiff from the effect of having voluntarily paid an amount of taxes against which he might have offset a bad debt.

GALVESTON ELECTRIC CO. v. GALVESTON

(U. S. Supreme Court, April 10, 1922)
(Not yet reported)

Record: Appeal from the District Court for the Southern District of Texas to review a decree dismissing without prejudice the bill in a suit to enjoin the enforcement of a street railway rate ordinance. Affirmed. See same case below (272 Fed. 147).

Facts: There were a number of questions in this case but the only one which has a bearing on income or similar taxation is stated below.

Question: In calculating whether any given fare will yield a proper return to a street railway company, is the amount of the Federal income tax paid by the company a proper deduction from gross revenue?

Decision: "The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920. the sum of $16,254, paid by the company during that year for Federal income taxes. The tax referred to is presumably that

imposed by the Act of February 24, 1919, chap. 18, sections 230-238, 40 Stat. at L. 1057, 1075-1080, Comp. Stat. sections 6371¼a, 6336⅛nn-6336⅛rr, which, for any year after 1918, is 10 per cent of the net income. In calculating whether the 5-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between State and Federal taxes, or between income taxes and others. But the fact that it is the Federal corporate income tax for which deduction is made must be taken into consideration in determining what rate of return shall be deemed fair. For, under section 216, the stockholder does not include in the income on which the normal Federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment.''

GAVIT v. IRWIN, COLLECTOR

(U. S. District Court, N. D. New York, August 22, 1921)
(275 Fed. 643)

Record: Revenue Act of 1913. Action to recover taxes paid under protest. Demurrer to complaint overruled.

Facts: By the terms of the will of Anthony N. Brady, deceased, his estate was divided into six equal parts, and one-sixth was devised in trust to his executors, who were thereby made trustees. The trustees were directed to apply so much of the income and profits from such one-sixth as in their discretion they thought necessary for the plaintiff's daughter, and to divide the remainder of the income of such one-sixth, not necessary for the support of the daughter, into two parts, one of said parts to be paid to the plaintiff during his life, but not longer than the infancy of his daughter, and not longer than her natural life, should she die before attaining the age of twenty-one years. During the tax years of 1913, 1914, and 1915, the plaintiff received certain sums of money under the provisions of the above-mentioned will, upon which he had been required to pay, as normal tax, additional tax, and penalties, the sum of $21,602.16. This action was brought against the collector to recover the amounts so paid.

Question: (1) Were the amounts received by the plaintiff income within the meaning of the Sixteenth Amendment to the Constitution of the United States?

(2) Were the amounts received by the plaintiff income within the meaning of the Revenue Act of 1913?

(3) Is the right to inherit to be considered as capital from which taxable income may be derived?

Decision: (1) "The courts have held that income, within the meaning of the Constitution and the Income Tax Act passed pursuant to the Sixteenth Amendment, must be taken in the common understanding of the term. Eisner v. Macomber, 252 U. S. 189. * * * Income, as laid down by the United States Supreme Court, within the purview of the constitution, is defined as: * * * 'The gain derived from capital, from labor, or from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets.' * * * Since the moneys received by plaintiff were not income from labor, nor from labor and capital combined, nor from the sale or conversion of capital assets, we have only to do with income received from capital. Income, as now considered, is, after the severance, separate and apart from the capital; it is as separate and apart from the capital as the fruit from the tree, the crops from the land, or the waters in the outlet stream after passing out of the reservoir. It is something which has grown out of or issued from capital, leaving the capital unimpaired and intact. Having these considerations in mind, it cannot be said that these moneys received by the plaintiff arose from any capital of his."

(2) "There is nothing in the Act of 1913 which taxes income which is not the income of the citizen or the individual sought to be taxed. * * * There is no suggestion in subdivision B that the income of estates as such, regardless of what disposition is made of the income, shall be taxable, and the tax thereon paid by any person, either in his individual right or as fiduciary. The other provisions of the Act relating to fiduciaries are in entire harmony with this construction. Subdivision 2, paragraph D, requires the guardians, trustees, etc., of persons who are subject to an income tax be-

cause of the amount of income received from such property, acquired by gift, bequest, devise, or descent, to make a return of the net income of such persons, subject to this tax, for whom such guardians or trustees act. * * * To make these fiduciary provisions and subdivision B applicable, and to bring a person thereunder, there must be both income of the property received by gift, bequest, devise, or descent, and also the property or capital itself. Unless there is both, there is no income within the meaning of these provisions of the Income Tax Law, and no income tax to be paid; nor is there any return to be made by the fiduciaries, nor any tax to be withheld from the moneys paid to the beneficiary. Applying this to the case at bar, we must find as to the plaintiff both the income from the property acquired by gift, bequest, devise, or descent, and the property itself, within the meaning of the Income Tax Law of 1913. If these moneys received by the plaintiff from the trustees from this one-sixth portion of the Brady estate are income as to him, where is the property acquired by the plaintiff from the Brady estate—in other words his capital, either in present possession or right of future possession, from which the income arose? Clearly there is none. He never gets the property which produces the income. So as to him there is not both the property acquired by gift, bequest, devise, or descent and the income thereof. * * * From the foregoing it must be determined that there is no provision of the income tax law of 1913 by which it can be held that the moneys received by plaintiff during these years 1913, 1914, and 1915 are income and taxable."

(3) "The learned district attorney recognizes and concedes that 'income' must be something separate, apart, and distinct from 'capital,' both belonging to the plaintiff. He argues in his brief that the *right* to receive the moneys must, of necessity, be the *capital* or corpus from which the moneys received by the plaintiff accrued. This contention does not carry conviction. Heirs have a *right* to inherit. That does not make the inheritance income. So, too, an instrument providing for the future transfer of property would give the transferee the *right* to it, but would not thereby make the transferred property income. * * * To call such a

right property or capital, or the equivalent thereof, within the provisions of the Act of 1913, would be unreasonable.''

IN RE GENERAL FILM CORPORATION
UNITED STATES v. KELLOGG

(U. S. Circuit Court of Appeals, Second Cir., June 8, 1921)
(274 Fed. 903)

Record: Act of October 13, 1913. Bankruptcy proceedings. An order of the referee disallowing claims of the United States for taxes was affirmed by District Court. Appeal by United States. Affirmed.

Facts: The United States filed proof of claim against the General Film Corporation, bankrupt, under the above Act for income tax with interest. The trustee in bankruptcy objected to the allowance of the claim on the ground that the company had correctly returned and paid its tax, and moved that the Government's proof of debt be considered and rejected. The bankrupt had contracted with a number of manufacturers of moving picture films to lease their films at a rate of 9 cents per foot. In addition to this flat rate, the bankrupt agreed to pay to the manufacturers the balance of such net profits remaining after deducting a dividend of 7% on its preferred stock and a dividend of 12% on its common stock. This balance of net profits was to be paid to and apportioned among the manufacturers according to the number of feet of film furnished by each manufacturer. All the common stock of the bankrupt corporation was owned by the manufacturers who were parties to this contract.

Questions: (1) May the bankruptcy court pass on the validity of the tax in the first instance or must the trustee in bankruptcy pay the tax and proceed under Rev. Stat. 3226?

(2) Is the amount over and above the flat rate which the bankrupt paid to the manufacturers under this contract a payment in the nature of a dividend rather than a payment of rent?

Decision: (1) ''We regard this section [Section 64a of the Bankruptcy Act] as binding upon the Government because it is named therein and, while conferring priority, as giving the bank-

ruptcy court the power to hear and determine any question that arises as to the amount or legality of a tax assessed by it. The provision applies to taxes of all the persons mentioned, and we could not differentiate the Government from the other persons in the absence of language justifying it.'' It was further held that Section 3226, U. S. Rev. Stat., could under no circumstances apply to this case because the trustee is not seeking to maintain a suit for the recovery of internal revenue taxes illegally assessed, and did not become such a party by his motion to reconsider and reject the claim.

(2) ''The charge of nine cents a foot for the films was shown to be much below what they seem to have been worth, and the additional payment was not to be made to the manufacturers in proportion to the stock they held, but in proportion to the amount of film footage each had furnished the bankrupt during the year. They furnished different amounts and were entitled to their proportion of the surplus without any reference to the amount of their stockholding or even if they held no stock at all.''

Accordingly, the court refused to disturb the construction which the referee and the court below put upon the contract, disallowing the claim of the United States.

GREINER, EXECUTRIX v. LEWELLYN, COLLECTOR

(U. S. Supreme Court, April 10, 1922)
(Not yet reported)

Record: Revenue Act of 1916. In error to the District Court for the Western District of Pennsylvania to review a judgment in favor of defendant in a suit against the collector of internal revenue to recover part of an amount assessed as an estate tax. Affirmed.

Facts: In determining the net value of the estate upon the transfer of which the tax was imposed, the collector had included bonds issued by political subdivisions of the state of Pennsylvania. The executrix claimed that to include these municipal bonds was in effect to tax them,—which the Federal government is, under the Constitution, without power to do.

Question: Has Congress power to require that state and municipal bonds held by a decedent be included for the purpose of determining the net value on which the estate tax is imposed?

Decision: The estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax, like that on income from municipal bonds.

The Federal government may impose a succession tax upon a bequest to a municipal corporation of a state (Snyder v. Bettman, 190 U. S. 249), or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a state as inheritance tax, for the estate tax is the antithesis of a direct tax, New York Trust Co. v. Eisner, 256 U. S. 34, ante 370. Municipal bonds of a state stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is made.

It follows that, in determining the amount of decedent's real estate, municipal bonds were properly included.

HART v. TAX COMMISSIONER

(Sup. Judicial Court of Mass., Oct. 31, 1921)
(132 N. E. 621)

Record: Mass. Income Tax Law, St. 1916. Suit against Tax Commissioner for abatement of income tax. Judgment ordered for plaintiff.

Facts: Complainant was a resident of New York at all times prior to January 26, 1918. She then became a resident of Massachusetts. Under protest she filed a return of income received during 1917 and paid a tax assessed thereon. Section 12 of the Massachusetts Act provides that the return shall be filed and the tax paid by every person who is, at any time between January 1 and June 30, of the year following the taxable year, an inhabitant of the commonwealth.

Question: May a state legally levy a tax upon income received by a person for a year during which he was a non-resident

of that state where such person becomes a resident after the close of the taxable year?

Decision: The tax in question is not an excise tax, nor is it a personal property tax. "It is laid directly on the income of property, and as already stated is in reality a tax on the property itself * * *. The tax in question was essentially one on property, and not an excise.

"We realize, also, that the law as to the situs of income for the purposes of taxation is not yet fully developed. But in view of the construction placed by this court upon the income tax of 1916, and the fact that this commonwealth had no jurisdiction over the person, property or business of the complainant during the year 1917, we are of the opinion that the tax in question was invalid."

HATTIESBURY GROCERY CO. v. ROBERTSON

(Supreme Court of Miss., April 18, 1921)
(88 So. 4)

Record: Mississippi Income Tax Act and State Constitution. Suit to recover income taxes alleged to be due from defendant corporation to the state. Judgment for plaintiff after appeal from a justice of the peace and defendant appeals. Affirmed.

Facts: The statute, under which the tax in question was sought to be collected, imposes a tax on all incomes with certain exceptions in excess of $2,500. Section 112 of the State Constitution provides that property shall be taxed in proportion to its value and shall be assessed for taxes under general rules and by uniform rules according to its true value.

Question: Is an income tax a tax on property within the meaning of Section 112 of the State Constitution and hence invalid as in conflict with the requirements of that section?

Decision: A tax on income is in the last analysis simply a portion cut from the income and appropriated by the state as its share thereof, and, while it includes some of the elements both of a tax on property and of a tax on persons, it cannot be strictly classified as a tax on either, for it is generally and necessarily an excise. Section 112 of the Constitution contains no language even

remotely indicating that its purpose is to withdraw from the Legislature the power to tax any species of property or any of the activities of persons who enjoy the protection of the state's laws. Section 112 was adopted to prevent discrimination in the taxation of property and an income tax does not violate this principle.

HILL v. WALLACE, SECRETARY OF AGRICULTURE, et al.

(U. S. Supreme Court, October Term, 1921)
(Not yet reported)

Record: Future Trading Act, approved August 24, 1921. In equity. Decree of District Court reversed and case remanded for further proceedings.

Facts: This bill was filed by eight members of the Board of Trade of the City of Chicago, who sue in behalf of all other members who may wish to join against the Secretary of Agriculture, the Commissioner of Internal Revenue, United States District Attorney for the Northern District of Illinois, the Collector of Internal Revenue for the first district of that State, the Board of Trade of the City of Chicago, its President, Vice-President and Director. The bill avers that the complainants applied to the directors of the Board of Trade to institute a suit to have the Future Trading Act adjudged unconstitutional before they should comply with it, but the board of directors refused to take any steps and announced that they intended to comply with the provisions of the Act. The bill alleges that the Act in question is unconstitutional and prays for an injunction against the Secretary of Agriculture to prevent him from compelling the Board to comply with its provisions, against the Commissioner and Collector and District Attorney from attempting to collect any tax, penalty, or fine under the Act, and against the Board of Trade and its officers from taking any steps to comply with the Act.

Questions: (1) Assuming the Act to be invalid, have complainants on the face of their bill stated sufficient equitable grounds to justify granting the relief asked?

(2) Is this a suit for an injunction against the collection of a tax in violation of Section 3224 R. S. insofar as it seeks relief against the District Attorney and Collector of Internal Revenue?

(3) Is the Act a valid exercise of the taxing power of Congress?

(4) Can these regulations of Boards of Trade by Congress be sustained under the commerce clause of the Constitution?

(5) Part of the Act being invalid, what sections will stand by virtue of the saving provisions in Section 11?

Decision: (1) "We think it clear that, within the cases of Smith v. Kansas City Title & T. Company, 255 U. S. 180; Brushaber v. Union Pacific R. Co., 240 U. S. 1, 10; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, and Dodge v. Woolsey, 18 Howard 331, 341, 346, the averments of the bill entitle them to relief against the Board of Trade of Chicago, its president and its directors. The bills shows that the Act, if enforced, will seriously injure the value of the Board of Trade to its members, and the pecuniary value of their memberships. If the law be unconstitutional, then it was the duty of the Board of Directors to bring an action to resist its enforcement."

(2) "It has been held by this Court, in Dodge v. Brady, 240 U. S. 122, 126, that section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would necessitate a multiplicity of suits, and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the Act, would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this Act make section 3224 inapplicable. The right to sue for an injunction against the taxing officials is not, however, necessary to give us jurisdiction. If they were to be dismissed under section 3224, the bill would still raise the question here mooted against the Board of Trade and its directors. The Solicitor General has appeared on behalf of the

Government, and argued the case in full on all the issues. Our conclusion as to the validity of the Act will, therefore, have the same effect as did the judgment of the court in respect to the income tax law in Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, to which the Government was not a party, but in which the Attorney General, on its behalf, was heard as amicus curiae.''

(3) ''It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the Act recites that one of its purposes is the regulation of boards of trade. As the bill shows, the imposition of 20 cents a bushel on the various grains affected by the tax is most burdensome. The tax upon contracts for sales for future delivery under the revenue act is only 2 cents upon $100 of value, whereas this tax varies, according to the price and character of the grain, from 15 per cent of its value to 50 per cent. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all. * * * The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. * * * Our decision, May 15, 1922, in Bailey v. Drexel Furniture Co., involving the constitutional validity of the Child Labor Tax Law, completely covers this case.''

(4) ''We come to the question, then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the state. House v. Mayes, 219 U. S. 270; Broadnax v. Missouri, 219 U. S. 285. There is not a word in the act from which it can be gathered that it is confined in its operation to

interstate commerce. The words 'interstate commerce' are not to be found in any part of the act, from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago, for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from evidence before it, to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

"It follows that sales for future delivery on the Board of Trade are not, in and of themselves, interstate commerce. They can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. United States v. Ferger, 250 U. S. 199." (Cases of Stafford v. Wallace, decided May 1, 1922; United States v. Patten, 226 U. S. 525, and Swift & Co. v. United States, 196 U. S. 375, cited and distinguished.) "But the form and limitations of the act before us form no such basis as those cases presented for Federal jurisdiction and the exercise of the power to protect interstate commerce. Our conclusion makes it necessary for us to hold section 4, and those parts of the act which are regulations affected by the so-called tax imposed by section 4, to be unenforceable."

(5) "Section 4, with its penalty to secure compliance with the regulations of boards of trade, is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. * * * There are sections of the act to

which, under section 11, the reasons for our conclusion as to section 4 and the interwoven regulations do not apply. Such is section 9, authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion.

"The injunction against the Board of Trade and its officers, and the injunction against the Collector of Internal Revenue and the District Attorney, should be granted, so far as section 4 is concerned and the regulations of the act interwoven within it. The court below acquired no personal jurisdiction of the Secretary of Agriculture and the Commissioner of Internal Revenue by proper service, and the dismissal as to them was right."

HOME INSURANCE COMPANY v. NEW YORK STATE

(U. S. Supreme Court, April 7, 1890)
(134 U. S. 594)

Record: Corporation tax law of New York, passed May 26, 1881, c. 361. Agreed case to determine plaintiff's liability for tax. Error to the Court of Appeals of New York which gave judgment in favor of the State. Judgment affirmed.

Facts: The State assessed a tax of $7,500 against the plaintiff under a statute providing that every corporation therein enumerated should be subject to a tax upon "its corporate franchise or business," computed by the extent of the dividends upon its capital stock. The company resisted payment of the tax, assuming that it was in fact levied upon capital stock, and contending that the tax should be reduced in proportion to the amount which the company had invested in U. S. Bonds.

Question: Was the tax upon the capital stock of the corporation invalid so far as bonds of the United States constituted a part of that stock?

Decision: "In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th

Wallace, that the tax for which the suit is brought is not a tax upon the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.''

HURST v. LEDERER, COLLECTOR

(U. S. Circuit Court of Appeals, Third Cir., June 3, 1921)
(273 Fed. 174)

Record: Act of March 1, 1879, chapter 125, section 2. Action to recover taxes collected under protest. In error to District Court where a judgment was entered for defendant. Affirmed.

Facts: The alleged illegality of the collection consisted in the fact, asserted by Hurst, that he had already paid the tax to the collector by a payment thereof made to one Wright a deputy collector of Lederer, the defendant. The proof showed that on the day the taxes were payable, Hurst telephoned to Lynch, a friend of his in the Post Office Department, and inquired about the number of people who were waiting to pay taxes. Lynch told him it was large but that he would get him inside the railings. Lynch took Hurst to the desk of Wright, a deputy collector. There was a conflict in testimony as to whether the money was given to Wright or left on the desk of one Betts, who was the deputy ''in charge of the district where Hurst's place was.'' The court assumed that there was sufficient evidence for the jury to find that Wright got the money. No proof of Wright's authority to receive the money was adduced and the only statutory authority cited was the Act of March 1, 1879, granting power to collectors to appoint deputies and also providing that ''each such deputy shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself.''

Question: Is a deputy collector authorized by law to receive payments of taxes which are not levied or assessed within the portion of the district assigned to him?

Decision: This suit being to recover taxes illegally collected, the burden of showing a previous payment rested on the plaintiff, and inasmuch as the proof was that Lederer had never received the money, and had never authorized Wright to receive it for him, it is apparent Hurst has not made out a case against Lederer, unless the law itself makes Lederer's appointment of Wright as deputy collector carry with it the right and authority to collect money. The court then referred to the Act of March 1, 1879, and concluded that the plaintiff cannot justify his alleged payment to Wright by the terms of the statute since Betts was the deputy to whom alone the language of that statute could apply. In the absence of Betts "the cashier was the only person to whom Hurst could pay his money, so as to bind Lederer."

IN RE INMAN'S ESTATE
PAULSEN et al. v. HOFF, STATE TREASURER

(Supreme Court of Oregon, July 19, 1921)
(199 Pac. 615)

Record: Oregon Inheritance Tax Law. The executors of the Estate of Inman, deceased, filed a petition to determine the amount of inheritance taxes to be paid the state; and from a decree denying a deduction from the assessment, they appeal. Modified.

Facts: In their petition the executors asked that the Federal estate tax be deducted, before calculating the amount of the state inheritance tax. The court refused to deduct the amount of the federal estate tax and the executors appealed.

Question: Should the federal estate tax be deducted from the gross value of the estate before calculating the amount of the state inheritance tax?

Decision: "So far as we have been able to discover, every reported judicial opinion which recognizes and observes the well defined and universally acknowledged distinction between an estate tax and an inheritance tax is to the effect that the federal estate tax must be deducted before measuring the amount of the state inheritance tax unless, however, some peculiar and unusual language appearing in the state statute controls and produces a different result."

"The federal estate tax should have been deducted before measuring the amount of the state inheritance tax."

KAHN et al., EXECUTORS v. UNITED STATES

(U. S. Supreme Court, Dec. 5, 1921)
(Not yet reported)

Record: Act of June 13, 1898, and Acts of June 27, 1902, and of July 27, 1902. Appeal from the Court of Claims to review a judgment which dismissed a petition for a refund of succession taxes. Affirmed. See same case below, 55 Ct. Cl. 271.

Facts: This suit was brought to have refunded $58,885.98 paid in taxes assessed upon legacies under the Act of June 13, 1898. The decedent, Wolf, died on October 1, 1900. He provided by will for fifteen separate trusts, the income of each to be payable for life to the beneficiaries. The amount or value of the fifteen trusts was ascertained before July 1, 1902. None of the funds directed to be paid to the trustees had been paid to them, or set apart or established by that date; but no reason was shown why they should not have been. The value of the estate was over $7,000,000, and the total amount of the fifteen trusts was $730,000, and it was known before July 1, 1902, that no controversy or outstanding claim could affect the value of any but the residuary legacies. The will was admitted to probate and letters testamentary issued on November 7, 1900. Publication of notice to creditors was begun on November 7, 1900, and on August 8, 1901, the court entered an order declaring that creditors who had neglected to file claims were barred. On July 1, 1902, the only unadjusted matters were claims for taxes for relatively small sums.

Question: Were the legacies contingent beneficial interests, not vested in possession or enjoyment on, or prior to, July 1, 1902, so that the amount paid as taxes upon such legacies is recoverable under the Acts of June 27, 1902, and of July 27, 1902?

Decision: The beneficial interests were contingent unless the legatees were on July 1, 1920, in actual possession or enjoyment or were entitled to immediate possession or enjoyment. The mere failure of executors to establish the trust fund will not prevent the

vesting of a legacy, if, under the state law, the time for payment has come, the right thereto is uncontroverted, and it is clear that the money retained will not be needed to satisfy outstanding claims. On July 1, 1902, the trustees were entitled to the possession of the funds, and all the beneficiaries to the immediate enjoyment of the income thereof, with the exception of the amount involved in controversies over taxes. The executors might then have paid over the balance of the estate in their hands to the trustees, retaining funds sufficient to satisfy the claims in dispute. The amount on which the taxes here in question were assessed is not shown to have exceeded the amount of such balance.

The beneficial interests were, therefore, vested; and taxes were properly assessed thereon.

KELLY v. LEWELLYN, COLLECTOR

(U. S. Dist. Court, W. D. Penn., May Term, 1921)
(274 Fed. 108)

Record: Volstead Act and R. S. Sec. 3224. In equity. On motion to dismiss bill. Motion granted.

Facts: This bill seeks to restrain the collector from collecting a certain tax and penalty assessed against the plaintiff, under the provisions of section 35 of title 2 the Volstead Act. The bill denies the sale of any intoxicating liquors, and alleges that the defendant had no notice of the levy or assessment of the tax and penalty; that he filed with the collector an affidavit to that effect and asked abatement of the tax and penalty, which request was refused, and payment in full demanded, and that otherwise his property would be seized and sold; that said assessment and levy is without warrant of law; and that he is entitled to injunctive relief.

Question: Was the amount assessed a tax, within the taxing power of Congress, so that its collection cannot be enjoined by reason of R. S. 3224, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"?

Decision: The court pointed out that in License Tax Cases, 5 Wall. 462, it was held by the Supreme Court that unlawful sales of

liquor in a state where prohibition existed could be the basis for the collection of federal revenue taxes. "If Congress can thus impose taxes for the carrying on of a business prohibited by the laws of the state, on the ground that the unlawful business is thereby discouraged, may not Congress, on the same ground and for the same reason, impose taxes on the unlawful carrying on of a business prohibited by the national constitution, and the act of Congress passed for its enforcement?" The court came to the conclusion that the imposition of the tax in question was within the lawful power of Congress and that it could not inquire either as to the wisdom or justice of the imposition.

The court also held that even if it be admitted that part of the sum demanded of the complainant by the collector were a penalty, that it was the duty of plaintiff to pay all such sums as are in section 35 specifically denominated "taxes." The case of Kausch v. Moore, 268 Fed. 668, ante 280, was cited and relied on.

"As payment or tender of all taxes demanded is a condition precedent to an application for injunctive relief, the bill must be dismissed."

KELLY v. LEWELLYN, COLLECTOR

(U. S. Dist. Court, W. D. Penn, May Term 1921)
(274 Fed. 112)

Record: National Prohibition Act and R. S. 3224. In Equity. On motion to dismiss bill. Motion overruled.

Facts: This bill was filed to restrain the defendant from seizing property of the plaintiff and subjecting it to the payment of the penalty provided in title 2 sec. 35 of the National Prohibition Act. The plaintiff sets forth in his bill, at considerable length, averments which, if true, would relieve him from all liability under said section. In addition, thereto, he sets forth that, after a previous bill had been filed by him to enjoin the collection of both the taxes and the penalty mentioned in said section, this court refused the prayer of said bill because the plaintiff had not averred that he had paid the taxes required to be assessed by said section. See 274 Fed. 108. In the present bill he sets forth that he has paid the taxes assessed

against him in double the amount as required by the Act, but that, notwithstanding such payment, the defendant is proceeding to collect the penalty imposed by said section.

Question: Can the court restrain the collection of the penalty imposed by sec. 35 of title 2 of the National Prohibition Act?

Decision: "I am satisfied that Congress has not placed in the hands of the collector of revenue the power to collect, by distress and sale, the penalties provided for in the said section of the National Prohibition Act. This same question has been before courts in other jurisdictions, and decided in favor of the plaintiff, where similar bills have been filed." See Accardo v. Fontenot, 269 Fed. 447.

"The motion to dismiss the bill must be overruled."

KNOX v. McELLIGOTT, COLLECTOR

(U. S. Supreme Court, May 1, 1922)
(Not yet reported)

Record: Estate Tax Act of September 8, 1916. Action to recover taxes paid under protest. In error to U. S. Circuit Court of Appeals, Second Circuit, to review a judgment which reversed a judgment of the District Court, Southern District of New York, in favor of the plaintiff. 275 Fed. 545, ante 340. Reversed and remanded for further proceedings.

Facts: In 1912 the decedent conveyed certain securities to the plaintiff, who, shortly thereafter reconveyed the same to the decedent and his wife as joint tenants. In 1917 the decedent died, leaving his widow surviving him, and she and the plaintiff were made executors of the estate. In making the estate tax return, the plaintiff included the value of one-half of the jointly owned property which was owned and enjoyed by decedent, but did not include the value of the one-half of the jointly owned property which had been owned and enjoyed by the widow since the creation of the joint estate in 1912. The Commissioner added to the estate the half interest not returned by the plaintiff, and assessed an additional tax of $15,668.60, which the plaintiff paid to the defendant collector.

Question: Was the estate tax law of September 8, 1916, retroactive, so as to apply to a transfer made prior to its passage?

Decision: This case is governed by the decision in Shwab v. Doyle, post this volume.

IN RE KUETER'S ESTATE

STATE et al. v. KUETER et al.

(Supreme Court of S. D., March 31, 1922)
(187 N. W. 625)

Record: South Dakota Inheritance Tax Act. Appeal from an order entered in favor of State Tax Commission in a proceeding to collect an inheritance tax. Judgment and order reversed.

Facts: The decedent, four days prior to his death, conveyed to each of six children a quarter section of land. Each deed was for a nominal consideration. The evidence showed that, some 10 or 12 years prior to his death the deceased owned a farm of 480 acres; that at about that time he was compelled to abandon farm work because of ill health; that he then called his children together and advised them of his condition, and also told them that if they would stay and work on the farm and turn over to him the proceeds he would use the proceeds to buy more land until he had acquired a quarter section for each, when he would deed to each child a quarter section; that the children agreed to the proposition; and that the deeds made by the deceased were made in performance of the agreement on his part which had been fulfilled by the children on their part.

Question: Were the transfers in question made "in contemplation of death" within the meaning of the statute?

Decision: The phrase "in contemplation of death" refers to transfers made when the donor is looking forward to death as impending, and in view of that event. There was no evidence showing what the age of the deceased was, or that he believed or had any idea that he was near death. There is nothing to indicate that his condition was worse or different from what it had been for the past 10 years, except, of course, that he was 10 years older. There was nothing whatever to indicate that he thought death was impending.

"In our opinion the evidence affirmatively shows that the deeds were not executed in contemplation of death * * *"

LAEMMLE v. EISNER, EX-COLLECTOR

(U. S. District Court, S. D. New York, August 9, 1920)
(275 Fed. 504)

Record: Revenue Act of 1913. Action to recover additional taxes, with interest and penalties, paid by plaintiff, not under protest. Verdict directed for defendant, and against plaintiff.

Facts: Plaintiff, on May 5, 1913, controlled a majority of the stock of the Universal Film Mfg. Co. On the same date, David Horsley, a stockholder, entered into an agreement with one Powers giving the latter an option to purchase the stock owned by Horsley. On June 7, 1913, while the option agreement was still apparently in effect, and before a formal exercise thereof on the part of Powers, a part of the Horsley stock was, apparently through collusion of officers of the corporation, transferred to the name of Powers on the books of the company. When the plaintiff learned of this transaction, he purchased from Horsley the stock owned by the latter. In the agreement of sale between the plaintiff and Horsley the option agreement with Powers was expressly referred to and the plaintiff agreed to defend Horsley against any suit by Powers for breach of this agreement and to pay any judgment which the latter might recover. This transaction took place on June 11, 1913, and the plaintiff's contention is that he was advised and believed that the prior option agreement was void. On June 13, 1913, Powers formally exercised the option and, being unable to secure the stock, on July 24, 1913, brought suit against the plaintiff and the Universal Film Mfg. Co. to have himself declared the owner of the Horsley stock. Plaintiff was represented by counsel in this litigation, but no trial was ever had, a settlement having been reached on December 30, 1914. The action was discontinued on January 15, 1915. Plaintiff paid his attorneys $7,500 in 1914, and $51,700 in 1915 for their services in this action. These amounts were deducted by the plaintiff in his income tax return for the years 1914 and 1915. The deduction was disallowed and the plaintiff was obliged to pay additional taxes with interest and penalties. Upon the rejection of

claims for refund, this action was brought to recover the amount of the additional taxes so assessed and collected.

Question: Were the attorneys' fees paid by the plaintiff proper deductions in computing his net income subject to federal income taxes?

Decision: "After a full consideration of the facts of this case, I am constrained to the view that the sum of attorneys' fees paid in the litigation for the mastery of the Horsley stock, resulting in practically the ownership or control thereof and the consequent management of the company, under the facts and circumstances disclosed by the record, constituted a capital investment, and not a 'necessary expense actually paid in carrying on the business.' deductible from income derived from such business."

LEATHER MFRS'. NAT. BANK v. TREAT, COLLECTOR

(U. S. Circuit Court of Appeals, 2nd Cir. Jan. 28, 1904)
(128 Fed. 262)

Record: Act of June 13, 1898. Action to recover tax paid. Error to U. S. Circuit Court, S. D., New York, which rendered judgment for defendant. 116 Fed. 774. Judgment affirmed.

Facts: The defendant, in assessing the plaintiff the amount of a tax upon its capital included as a part of its capital the sum of $77,796 which, according to the complaint, was standing on the books of the plaintiff under the profit and loss account, and "represented the undivided profits of the plaintiff as the same existed at the end of preceding fiscal year."

Question: Was the sum in question taxable under the Act of June 13, 1898?

Decision: "When it appears, as it does in the present case, that the undivided profits have been carried over many dividend periods and have been accumulated 'during a period of years' and have in the meantime been used in the business like the other assets of the corporation, the inference is irresistible that they have become an accretion to the capital. When this appears, they are taxable, just as the accumulated profits of an individual are taxable when

they have been merged with his capital. This, we think, is the meaning of the statute.''

LEDBETTER v. BAILEY, COLLECTOR

(U. S. District Court, W. D. N. C., July 30, 1921)
(274 Fed. 375)

Record: Volstead Act and R. S. Sec. 3224. In equity. Suit by J. M. Ledbetter against J. W. Bailey, Collector of Internal Revenue, with 28 other cases. Decrees for complainant.

Facts: The facts in all of the cases were similar to those in the Ledbetter suit. In January, 1921, notice was received by Ledbetter that an assessment of taxes and penalties had been made against him, aggregating $3,083.34, on the ground that he had operated an illicit distillery. This notice was the first information to Ledbetter that such claim for taxes against him was in existence. Payment of the taxes was demanded. Complainant attempted to file a claim for abatement, but the collector refused to receive the same unless it was accompanied by a bond, which it appeared complainant was unable to furnish. When the collector was about to distrain on complainant's property this suit for an injunction was instituted.

Question: Are the so-called taxes assessed under section 35 of the Volstead Act really taxes or are they penalties, and if the latter, is R. S. Sec. 3224, prohibiting suits to restrain the collection of a tax, applicable to this case?

Decision: ''The conclusions of the court are therefore that under the provisions of section 35 of the Volstead Act taxes cannot be assessed or collected; that the double tax provided for in the act, and the penalties prescribed, are nothing more nor less than punishment for the commission of criminal offenses; that these penalties must be collected by civil actions, or pronounced as judgments in criminal cases; that the provisions of section 3224 do not apply, and that these suits are not forbidden thereby; that the court has jurisdiction to entertain the suits and issue the orders of restraint or decrees for injunction sought thereby.''

LEDERER, COLLECTOR v. CADWALADER

(U. S. Circuit Court of Appeals, Third Cir., August 18, 1921)
(274 Fed. 753)

Record: Revenue Act of 1917. Suit to recover an excess profits tax paid under protest. In error to the District Court, which entered a judgment for plaintiff. For case below see 273 Fed. 879, ante 617. Affirmed.

Facts: John Cadwalader, Jr., plaintiff below, was appointed executor and trustee of the estate of a Mr. Coxe, who died in 1916. His account, filed in 1917, shows that he received in commissions as executor $28,974. The Collector of Internal Revenue imposed an excess profits tax on these commissions under the Revenue Act of 1917. The testimony disclosed that the plaintiff was a lawyer and had no other profession. He had nothing to do with the preparation of the will and never represented the testator professionally. There was no testimony tending to show that he ever held himself out as a person specially qualified to act or desirous of acting as executor, and so far as the testimony showed this was the first and only time that he ever acted as such.

Question: Was the defendant, in acting as executor, conducting a "trade or business" within the meaning of the Revenue Act of 1917 and so liable to the excess profits tax under that act upon the commissions received from such executorship?

Decision: "Taxes on income from a 'trade or business' clearly mean taxes on the income from the trade, business, profession, or occupation of the taxpayer himself. This is the plain meaning of the statute, and any other construction distorts the simplicity of the language and requires that we read into the language something it does not contain. A single, isolated activity of the character of the executorship of the plaintiff does not constitute a trade, business, profession, or vocation under the facts of this case." * * *.

"The question of whether acting as executor of this estate was the business, occupation, or profession of the plaintiff was correctly submitted to the jury, whose verdict settled the fact in the negative, and the judgment of the District Court will therefore be affirmed."

LEVY v. WARDELL, COLLECTOR

(U. S. Supreme Court, May 1, 1922)
(Not yet reported)

Record: Estate Tax Act of September 8, 1916. In error to the U. S. District Court, N. D. California, to review a judgment which dismissed the complaint in an action to recover back a federal estate tax as having been unlawfully collected. Reversed and remanded for further proceedings.

Facts: In 1902, 1903, and 1907, the decedent transferred to the plaintiff certain securities. The transfers of the stock to plaintiff were complete and there were no agreements or stipulations by which the decedent would be entitled to a return of the stock except that plaintiff promised and agreed to pay to her the dividends accruing thereon during her lifetime, she, however, retaining no testamentary disposition or any legal right whatsoever over the stock or any part of it, or any right of revocation. The decedent died on December 15, 1916, leaving no assets whatever. However, the Commissioner assessed, and the defendant collected, a tax of $12,460.84 from the plaintiff on the theory that the above transaction came within the Revenue Act of 1916.

Questions: (1) Was the Estate Tax Law of 1916 retroactive, so as to apply to transfers made prior to its passage?

(2) Was the trial court correct in bringing into the case, on plaintiff's motion, the successor to the collector to whom the tax sought to be recovered had been paid?

Decision: (1) and (2): This case is governed by the decisions in Shwab v. Doyle and Union Trust Co. v. Wardell.

LIEBMAN v. FONTENOT, COLLECTOR

(U. S. District Court, W. D. Louisiana, July 1, 1921)
(275 Fed. 688)

Record: Revenue Act of 1916. Action to recover federal estate tax paid under protest. Exception to petition sustained.

Facts: Plaintiff, administratrix of the succession of her deceased husband, by virtue of the community property law of Louisiana, owned one-half of the property acquired by the husband

after the marriage, and was entitled to the usufruct of the remaining half, inherited by the heirs of the husband, he not having by will deprived her of such usufruct. The total community property was $324,218.02, and the plaintiff in her return to the collector of the half owned by the estate of her husband, deducted therefrom the value of the usufruct of such half, to which usufruct she was entitled, basing its value on her life expectancy, capitalized at the legal rate of interest, 5%. Subsequently, the collector figured the tax on the value of the half interest as shown by the inventory, $162,109.01, as against the value fixed by the administratrix after deducting the value of the usufruct, $105,433.16. This action was brought to recover the additional tax collected from the plaintiff as the result of the increased valuation.

Question: In computing the value of the community property going to the heirs of the deceased spouse, should the value of the life usufruct in favor of the wife, with which it is encumbered, be first deducted before calculating the estate tax?

Decision: "The wife's usufruct of the community half interest of the deceased husband is not an absolute right, inherent in her. She takes such usufruct only when the husband has not, by will or testament, disposed of his half of the community. * * *. The federal inheritance tax is an excise tax, levied on the estate transmitted from the living to the dead. The estate so transmitted, in this instance, is Liebman's undivided half interest in the community. The property itself goes to his heirs, subject, however, to the usufruct of his widow. The federal law, unlike that of the state, makes no distinction in the rate between certain heirs. It is a fixed tax on the transmission of the estate without regard to whom it descends. It is to be paid out of the estate, and so the court is not concerned with the proper division of the tax as between the heirs and the widow."

LILLEY BUILDING AND LOAN COMPANY v. MILLER, COLLECTOR

(U. S. District Court, S. D. Ohio, E. D., 1922)
(280 Fed. 143)

Record: Revenue Act of 1918. Action to recover corporate income taxes paid under protest. Petition dismissed.

Facts: The plaintiff was a corporation organized under the laws of Ohio, which provided that "a corporation for the purpose of raising money to be loaned to its members shall be known * * * as a 'Building and Loan Association' or as a 'Savings Association'." It received deposits from non-members evidenced by entries in books such as are ordinarily used by Savings Banks. Withdrawals could be made on presentation of books. On these accounts (which constituted the bulk of its business) it paid interest at a stated rate of 4%. It also received time deposits for which it issued certificates bearing interest at the rate of 5%. There were two classes of stock, both of which received semi-annual dividends at the rate of 5% per annum. In the year 1920 the plaintiff's stockholders numbered 301, its borrowers 595, of whom but two were stockholders, and its savings depositors 2239. Its loans were all made upon homes, the average amount of each being about $3500. The few loans made to members took the same course as those to non-members. The borrowing members gave their notes and paid them off in installments, such obligations being entirely disassociated from their obligations to pay for stock. The ordinary building association method of subscribing for stock to the amount of the loan, the stock when paid up extinguishing the loan, was not pursued.

Questions: (1) Did the definition of the term "Building Association" contained in the Statutes of Ohio control the right of the plaintiff to exemption from Federal income taxes?

(2) What effect did the making of loans to non-members have upon the plaintiff's right to exemption?

(3) Was the plaintiff exempt from taxes under Section 231 (4) of the Revenue Act of 1918?

Decision: (1) "Plaintiff's interpretation is that corporations organized under building association laws are exempt, although

operated not for mutual purposes and with a profit to a limited number of stockholders, be they ever so few. Such an interpretation would seem to violate the intent of the Act. Recurring to the matter of the nomenclature under the Ohio Statutes, if we regard the plaintiff as a "savings association," we would have a mutual bank, *with* capital stock, *not* organized and operated for mutual purposes, and *not* without profit. The matter certainly can not rest so lightly as on the arbitrary choice of a name. The facts must control."

(2) "It is not thought that the making of loans to non-members, or borrowing from non-members, or receiving deposits to be withdrawn on demand or on time, so long as such transactions are simply incidental to the primary business of operating a mutual Building Association, would defeat the exemption."

(3) "But here the association has put aside the attribute of mutuality; indeed, it is most difficult to distinguish its activities from those of the ordinary savings bank. Its primary design no longer is to be an instrumentality of mutual helpfulness among its contributors in saving and borrowing for home owning; but its object now is the receiving of deposits from, and lending money on interest to, the public for the profit of the stockholders. * * * It may not be possible to define precisely how far a building association may go in extraneous activities without losing its essential character; but it seems clear that, when it ceases to be substantially mutual and adopts as its chief business dealing for profit with the general public by the methods of an ordinary savings bank, it is no longer a building association, entitled to be exempted from income taxation under the statute in question."

LIPKE v. LEDERER, COLLECTOR

(U. S. Supreme Court, June 5, 1922)
(Net yet reported)

Record: Section 3224 R. S.; Section 35 National Prohibition Act. Action to restrain the collection of certain alleged taxes. Bill dismissed, upon motion, for want of equity, by U. S. District Court. 274 Fed. 493. Decree reversed and cause remanded.

Facts: On December 29, 1920, the complainant was arrested for selling liquor contrary to the National Prohibition Act and gave bail to appear and answer in the United States District Court. This prosecution is still pending. On March 18, 1921, complainant received from the defendant collector a ''notice and demand for tax''; and on March 31, 1921, a second notice. By the latter he was informed that, if he did not pay the alleged tax within ten days, collection would be made by seizure and sale of his property. The amount demanded is $557.29 made up of three items: one for $45.83 for double tax under Section 35; another of $11.46 called penalty under Section 3244 of the Revised Statutes, and a further amount of $500 ''special penalty'' under section 35. This action was commenced on May 25, 1921, to enjoin the defendant collector from proceeding to collect the above amount by distraint.

Question: (1) Is this case properly before the Supreme Court by direct appeal from the District Court?

(2) Are the amounts which the defendant seeks to collect in fact ''taxes''?

(3) How is the imposition directed by Section 35, National Prohibition Act, to be enforced?

(4) Is Section 3224, R. S. applicable to this case?

Decision: (1) ''The cause is properly here by direct appeal from the District Court. Appellant claims that, as construed and sought to be enforced by the Collector, Section 35 of the Prohibition Act conflicts with the Federal Constitution. The point is substantial and sufficient to support our jurisdiction.''

(2) ''The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Bailey v. Drexel Furniture Co. (May 15, 1922). When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613. Evidence of crime (Section 29) is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax, whose primary function ''is to provide for the support of the Government,'' and clearly involves the idea of pun-

ishment for infraction of the law,—the definite function of a penalty."

(3) "Section 35 prescribes no definite mode for enforcing the imposition which it directs, and if it be interpreted as above stated, we do not understand counsel for the United States claim that relief should be denied to the appellant. Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for hearing,—this is essential to due process of law, Central of Georgia R. Co. v. Wright, 207 U. S. 127, 136, 138, 142,—and certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded."

(4) "The collector demanded payment of a penalty, and Section 3224, which prohibits suits to restrain assessment or collection of any tax, is without application. And the same is true as to statutes granting the right to sue for taxes paid under protest."

Dissenting Opinion: Mr. Justice Brandeis and Mr. Justice Pitney dissented from the above majority opinion and contended that, inasmuch, so far as it appears, the plaintiff had a full, adequate and complete remedy at law, and there was no danger of irreparable injury, the relief should be denied, whatever the construction of Section 35, National Prohibition Act, and even if it be deemed unconstitutional.

LONG v. WATTS

(Supreme Court of N. C., March 8, 1922)
(110 S. E. 765)

Record: North Carolina Income Tax Act, Pub. Laws 1921, C. 34. Civil action to enjoin the State Commissioner from collecting a tax. From a judgment granting the injunction, defendant appeals. Affirmed.

Facts: The plaintiff in this action was and had been for a number of years a state judge. This action was instituted to prevent the defendant from levying a tax on his official salary.

Questions: (1) Does the Constitutional provision that "salaries of the judges shall not be diminished during their continuance in office" prevent the imposition of a tax upon the official salary of a state judge?

(2) If the answer to the above question is Yes, may not an income tax be levied upon the judge's official salary when such salary has been increased by the same assembly which passed the act imposing the income tax, at least to the extent of the increase?

Decision: (1) "A tax which indirectly takes from the plaintiff a part of that which, by law, he is entitled to receive for his services is clearly within the prohibition against diminution." The court, therefore, concluded on this point that the official salary of the plaintiff was not subject to tax. "Let it be understood that this is the law as it is now written, and it can make no difference whether the tax be levied before or after the taking of office."

(2) "But it is urged that the Legislature of 1921 increased the plaintiff's salary and therefore the same or any subsequent Legislature may levy a tax against it without incurring the charge of having diminished it during his continuance in office. This argument is based on the contention that by adding an additional sum, the Legislature may then tax the whole so long as the tax does not exceed the increase. * * * The Constitution is not to be so easily discarded. The moment the increase took effect it became as much a part of the plaintiff's salary as the original amount, and the whole was then protested by the Constitutional provision against diminution."

IN RE LYON'S ESTATE

(Court of Appeals of N. Y., April 18, 1922)
(135 N. E. 247)

Record: Transfer Tax Law (Tax Law, section 220, subd. 7). An order of the Surrogate fixing a transfer tax was reversed by the Appellate Division (199 App. Div. 912, 190 N. Y. Supp. 938). The party opposing the tax appeals. Reversed.

Facts: On July 31, 1908, a house and lot was conveyed to Edmund Lyon and to Carolyn, his wife, as tenants by the entirety. In 1916 the New York Legislature amended its transfer tax statute

to provide that, where there is a joint tenancy or a tenancy by the entirety, the right of the survivor to the immediate ownership and enjoyment of the property shall be deemed a taxable transfer in the same manner as though the whole property belonged absolutely to the deceased tenant and had been bequeathed to the survivor by the deceased.

Question: Could the Legislature constitutionally place a transfer tax upon the surviving tenant by the entirety in the same manner as though the whole property belonged to the deceased tenant in a case where, although the deceased tenant died after the passage of the taxing act, the estate by the entirety was created before the passage of the act?

Decision: "Whatever power the Legislature may have with regard to such estates later created does not extend to those already vested before the adoption of the amendment. * * * This estate by the entirety with all its incidents was vested in Mr. and Mrs. Lyons in 1910. What was then acquired may not subsequently be diminished by a tax upon that acquisition. As there was no transfer after 1916, there can be no tax."

MALLEY, FORMERLY COLLECTOR v. HOWARD, et al., TRUSTEES

CASEY, ACTING COLLECTOR v. HOWARD, et al., TRUSTEES

MALLEY, FORMERLY COLLECTOR v. CROCKER, et al., TRUSTEES

MALLEY, FORMERLY COLLECTOR v. HECHT, JR., et al., TRUSTEES

(Circuit Court of Appeals, 1st Cir., June 6, 1922)
(281 Fed. 363)

Record: Revenue Acts of 1916 and 1918. Error to the District Court; reversed. Now pending in Supreme Court on writ of certiorari granted Oct. 23, 1922.

Facts: These cases involved the validity of taxes imposed upon business organizations, commonly known as Massachusetts Trusts, under the Revenue Acts of 1916 and 1918. The chief business of the Haymarket and Hecht Trusts was that of owning, man-

aging and leasing real estate, and distributing the net income to its shareholders. The Crocker Trust was a large manufacturing concern. Additional facts relative to these trusts are given below in the Decision.

The Act of 1916 levied a tax on associations "now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each $1,000 of capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included * * *. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year."

The Act of 1918, section 1, includes associations under the term "corporation", and in section 1000a provides for an annual "special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year," etc. "In estimating the value of capital stock the surplus and undivided profits shall be included."

Question: Are the plaintiffs associations having a capital stock represented by shares, within the meaning of the above provisions? (The Haymarket and Hecht Trusts deny they are associations within the meaning of the statutes. The Crocker Trust admits that it is an association but claims immunity from tax on the ground that it has no capital stock within the meaning of the statutes.)

Decision: In Eliot v. Freeman, 220 U. S. 178, ante 198, the court held the Act of 1909 not to cover two typical Massachusetts real estate trusts, on the ground that, "The language of the act, 'now or hereafter organized *under the laws of the United States,*' etc., imported an organization deriving power from statutory enactment." The present Acts cannot be given the same interpretation because Congress has changed the wording from "*organized under the laws of the United States or of any state,*" to "organized in the United States." It is elementary that when language used in an earlier statute has in application received judicial construction,

change in language in later analogous legislation imports legislative purpose to attain a different result.

In 1899, members of the Hecht family holding as tenants in common real estate in Boston conveyed it to Jacob Hecht, who declared a trust for twelve beneficiaries, who received certificates transferable like ordinary corporation shares, but with certain restrictions. While the Hecht trustee had broad general powers of management, including power to buy and sell, the seat of real power was with the shareholders and not with the trustee; for three-fourths of the shareholders might remove the trustee, three-fifths might terminate the trust or give him binding instructions, and also, what is of vital importance,—*modify the instrument in any particular.* The Hecht organization is not a trust within the doctrine of the Massachusetts decisions. Williams v. Milton, 215 Mass. 1. Compare Crocker v. Malley, 249 U. S. 223, and in re Association Trust, 222 Fed. 1012. The stockholders of the Hecht Trust have treated their dividends like corporation dividends in their income tax return. Plainly the Hecht Trust is quasi-corporate in form and power. It is an association within the meaning of the Revenue Acts.

"The Haymarket Trust, both in genesis and organization, is even more like a corporation. * * * The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it to also be quasi-corporate and an association within the meaning of the Revenue Acts."

The Crocker Trust was admitted to be an association but exemption was claimed on the ground that the concern had no capital stock. It had issued 96,000 shares of no par value transferable like corporation stock. It sought exemption on the ground that it had attached no par value to its 96,000 shares. "We cannot adopt this scholastic and artificial distinction * * *. It is for present purposes immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value. * * * Congress intended that this tax should be measured by the average amount of capital used during the tax year in doing the business. The phrase in the statutes as to 'including surplus and undivided profits' puts beyond doubt the question of the Congressional intent to measure this tax by business and financial realities, not by book-

keeping forms or mere names. * * * The Crocker Association cannot escape taxation, falling on its competitors, by adopting the modern theory of no par value for its stock.''

Massachusetts statutes have described such organizations as associations, and have put their liability to ordinary creditors apparently on the same basis as corporations. The court, therefore, had no hesitation in reaching the conclusion that they have now been given a *statutory basis as quasi-corporate*, and that they are associations within the meaning of the Federal Statutes, as well as under the Massachusetts Statutes.

''The conclusion now reached accords with the reasoning and decision of this court in Malley v. Bowditch, 259 Fed. 809.'' See ante 327.

MALLEY, COLLECTOR v. WALTER BAKER & CO.

(U. S. Circuit Court of Appeals, First Cir., Oct. Term, 1921)
(281 Fed. 41)

Record: Revenue Act of 1918. Suit to recover tax paid under protest. In error to the District Court, where a verdict was ordered for the plaintiff for the full amount claimed. Reversed and remanded.

Facts: The plaintiff, a manufacturer of sweet chocolate, made sales of such chocolate between February 24 and August 31, 1919, aggregating $635,137.50, and paid under protest the 5 per cent tax thereon under the provisions of Title 9, section 900 of Act of 1918, which imposes an excise tax on candy. The court below held that chocolate was an independent substance used directly for food and, though used in the manufacture of candy, was not candy within the meaning of the Act. The court directed a verdict for the plaintiff without submitting the question of fact of whether sweet chocolate was candy to the jury. The Commissioner had ruled that ''sweet chocolate sold in parcels of such size and shape that it is commonly purchased and considered as candy by the general public is taxable as candy, but sweet chocolate sold in large purchases not as candy but intended for further manufacturing purposes is not taxable as candy.'' * * *

Question: Was the Commissioner justified in making the taxability of sweet chocolate as "candy" depend upon the form in which it is sold and the use to which it is to be put?

Decision: The court overruled the decision of the lower court holding that sweet chocolate is food and hence that all of it is exempt from the tax, and approved the construction adopted by the Commissioner. "But this sweet chocolate product consists, as already noted, more than half of sugar. Sugar is far more important as a food element than is chocolate. Sugar is admittedly the basic ingredient of candy. To hold, as the court below held, that sweet chocolate is not candy because chocolate is also food, falls logically little short of holding that candy is not candy because sugar is also food. * * * We cannot agree with the court below that sweet chocolate is not candy simply because made up of about half and half of chocolate and sugar,—each of which is a food. Some other test must be found. * * * The distinction turns not so much on the composition of the article as on the way or form in which it is sold and upon the use made of it by its purchasers."

"The plaintiff is not entitled to recover more than the amount that it can show it paid as a tax on such portions of the product in question as were not sold and used as candy within the meaning of the Department's regulation."

MARTIN v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, March 10, 1922)
(Not yet reported)

Record: Revenue Act of 1917. Action to recover excess profits tax paid under protest. Judgment for defendant.

Facts: The plaintiff corporation acted as sole agent for the Martin Bennett Asbestos Mines, pursuant to a contract entered into between the Martin Bennett Asbestos Mines and Robert H. Martin in 1913. Under this contract, the plaintiff was obliged to make settlement for domestic shipments by sending its check, less commissions and interest, as soon as the invoices could be properly checked up. Plaintiff's balance sheet as of December 31, 1916, indicated that out of its assets of $97,842.10, $76,606.47 represented

accounts and bills receivable derived from sales for the account of the mine and sales on its own accounts and $13,872.50 represented loans as direct advances to the mines before the maturity of the bills of customers of the latter to whom plaintiff had sold products of the mines. The balance sheet of December 31, 1917, indicated that approximately only $16,000 of the capital and surplus which aggregated $78,330 was available in the form of cash in bank. During the year 1915 plaintiff purchased on his own account merchandise to the amount of $94,021.72, and sold such merchandise for $98,626.31. In 1916, such purchases on its own account amounted to $47,011.16, and sales on its account amounted to $49,225.66. In 1917 such purchases on its own account amounted to $27,156.55, and sales amounted to $49,289.89.

Question: Was the plaintiff entitled to assessment under Section 209 of the Revenue Act of 1917 as being engaged in "a trade or business having no invested capital or not more than a nominal capital?"

Decision: "If it had limited itself to buying and selling on commission, with a small incidental trading on its own account, the plaintiff's contention would be good, but in the case of this corporation it is evident that there was substantial trading on its own account, and also that it required capital to conduct its business in the way it was conducted. * * * It is urged that during the year 1917, outside of the months of January and February, when the remittances exceeded the receipts by $6,088, plaintiff was able to conduct its business without resorting to its capital. This argument is based on the fact that except during those two months it seems to have received more than it paid out. Its capital was, however, during this very period engaged in its business and being turned over in connection with sales of asbestos. Its advances included capital available or capital repaid from advances. If this is not so, I can not see where its capital was, or what use was being made of it. * * * Here it may be that there were sufficient bills and accounts receivable derived from sale of products of the mines to offset all loans and advances to the latter, but they have not been collected and the capital of the plaintiff was needed, though temporarily, to make good the advances which were con-

stantly made before the 60 days credits to customers of the mines had expired and the moneys came in. Every successful business would have its capital not only unimpaired but unemployed if its outstanding accounts receivable could be at all times liquidated forthwith, but the chief use of capital is to carry it along until the payments come in. I am of the opinion that the plaintiff had more than a nominal capital and had a substantial invested capital which was employed in making advances to or on account of the mines, and also in buying merchandise on its own account for profitable sale."

MASSEY v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Penn., Dec. 30, 1921)
(277 Fed. 123)

Record: Revenue Acts of 1916 and 1917. Suit to recover amount of additional income tax paid under protest by plaintiff. Judgment entered for defendant.

Facts: In February, 1918, the plaintiff filed with defendant his return for the year 1917. Of his gross income, the sum of $8,880 was received as interest on bonds containing covenants to pay to the bondholder interest without deduction of taxes imposed under any law of the United States. The normal tax of 2% upon the income thus derived, amounting to $117.60, paid by the corporations issuing the bonds, was not included by plaintiff in his gross income. Subsequently the Commissioner levied an additional assessment against plaintiff, the basis of which was the addition to his income of said sum of $177.60.

Question: Are taxes upon interest accruing upon bonds containing tax-free covenants withheld and paid by the corporate obligors taxable income of the obligee?

Decision: "The tax-free covenant in the bonds is equivalent to an agreement of the obligors to pay the owners the agreed rate of interest plus the taxes and it is immaterial whether the taxes are paid by the owners of the bonds to the Government and the amount thereof paid by the obligors to the owners or whether under the covenant and the statute the taxes are paid direct to the Government by the obligors.

"The taxes paid for the plaintiff by the corporation come within the definition of income as 'gains, profit, and income derived from any source whatever' in the Act of 1917."

The provision of the Revenue Act of 1917 that a corporation cannot deduct from its gross income the amount withheld by it as the normal tax on its bonds containing tax-free covenants does not show that the tax so paid was the tax of the corporation, and not of the bondholders, since Congress also refused to allow such corporations to deduct all interest paid by them.

The conclusion is that the plaintiff is not entitled to recover, and judgment will be entered for the defendant.

MAYES, COLLECTOR v. UNITED STATES TRUST CO.

(U. S. Circuit Court of Appeals, Sixth Circuit, April 4, 1922)
(280 Fed. 25)

Record: Act of October 22, 1914. Action to recover taxes paid under protest. In error to U. S. District Court, Western District of Kentucky, which rendered judgment for plaintiff. Judgment affirmed.

Facts: Plaintiff was incorporated in the year 1902 under the laws of Kentucky with authority, not only to carry on a "general trust and finance business" but also (among other things) to receive money on deposit and pay interest thereon, and to loan money on such securities as it may approve. The trust company not only carried on a general trust business, but received deposits subject to check, as well as on certificates, and made loans secured by collateral or mortgage. For the fiscal year 1915 plaintiff was assessed $312, being two-thirds of what would be the annual tax upon its entire capital, surplus, and undivided profits, inasmuch as only two-thirds of a fiscal year remained after November 1, 1914, when the liability to tax accrued. For the first half of the fiscal year 1916 it was assessed $230.50, being one-half of the annual tax Judgment was rendered in favor of the plaintiff for one-half the amount sued for. The defendant alone sought review.

Questions: (1) Was the plaintiff liable to the annual tax imposed by the Act of October 22, 1914, of $1 for each $1,000 of capital used or employed, including surplus and undivided profits?

(2) If so, how should the capital employed in the banking business be measured?

(3) Did the evidence support the finding of the trial court that one-half of plaintiff's capital was employed in the banking business?

Decision: (1) "It clearly appears from what has already been said that plaintiff was engaged in banking, and so was subject to the tax upon its capital employed in that business. (We shall use the term 'capital' as including surplus and undivided profits.) That plaintiff had some amount of capital employed in banking is equally clear. The fact, as asserted by plaintiff, that an amount equal to its capital, surplus, and undivided profits was permanently invested in its office building and in public securities has no tendency to show that its capital was wholly withdrawn from the banking business. These permanent investments equally secure plaintiff's creditors in the trust business and the banking business. Plaintiff was thus liable to taxation on the amount of capital employed in the banking business."

(2) "* * * At least in the absence of proof of a more satisfactory method, the capital so employed was properly measured by the ratio which the assets employed in the banking business bore to the assets employed in the aggregate business. * * * The difficulty lies in apportioning the assets between the trust and the banking businesses. The assessment was presumptive evidence of its correctness. It was open to the plaintiff, however, to show the contrary; but the burden rested upon it to do so, and if it failed, it was not entitled to recover."

(3) "Upon this record, it is obvious that less than plaintiff's entire capital was employed in banking. * * * But plaintiff's president (who was the only witness in the case), replying to a request to give (based on the figures he had submitted) the amount of the trust business during the two fiscal years as compared with the amount of the banking business, stated that the trust business was about six-sevenths and the banking end one-seventh. This estimate was apparently based largely, if not entirely, upon the moneys employed in the respective branches of the business; but, in the

absence of a better method of determining the ratio of capital employed in each business, we are unable to say that the testimony had no substantial tendency in that direction, having in mind the knowledge presumably possessed by the president of the relative earnings in the two departments and of their relative importance, and having in mind that apportionment of overhead expenses (such as rental use, upkeep, supervision, and perhaps to some extent clerk hire) would be largely a matter of estimate, and perhaps in some respects more or less arbitrary, unless on the basis of business transactions. We therefore think the evidence would fairly enable an inference to be drawn, within reasonable limitations, of the amount of capital employed in banking. If it would support an inference by the jury, it would equally support an inference by the judge upon a submission such as was made here. The trial judge, for some reason which is not apparent, determined that one-half plaintiff's capital was employed in the banking business. We need not determine whether that conclusion would be sustainable against complaint by plaintiff. It seems enough to say that, in our opinion, there was substantial evidence tending to support the conclusion that not more than one-half of plaintiff's capital was employed in banking, and thus that defendant is not prejudiced by the finding.''

McNALLY v. FIELD

(U. S. Circuit Court, D. Rhode Island, Dec. 20, 1902)
(119 Fed. 445)

Record: Act of June 13, 1898. Act of March 2, 1901. Petition for a writ of mandamus. Demurrer overruled and petition granted.

Facts: The Act of June 13, 1898, provided for a stamp tax on surety bonds ''except such as may be required in legal proceedings.'' These words were eliminated in the Act of March 2, 1901, which amended the prior act. Under the prior act, the Commissioner ruled that bonds of administrators were exempt, but it was ruled that the amendatory act, by eliminating the words quoted made such bonds taxable.

Questions: (1) Were administrator's bonds taxable under the Act of March 2, 1901?

(2) What weight is to be given to the decision of the Commissioner of Internal Revenue?

Decision: (1) "The Act of March 2, 1901, was amendatory to this act [of June 13, 1908], and its purpose, as the title shows, was to 'reduce taxation' under the original act. * * * It is manifest that Congress did not intend to enlarge the scope of the original act. In that act Congress evidently desired to tax all classes of bonds, but, on grounds of public policy or because such taxation might prove unconstitutional, it excluded bonds required in legal proceedings. Under such circumstances, it is not reasonable to conclude that it was the purpose of Congress, in an act to reduce taxation, to change the policy which it has followed since the adoption of the war revenue act of 1862 (12 Stat. 481), and to declare its purpose to tax this class of bonds. * * * Such a conclusion should rest on a stronger foundation than an interpretation of an ambiguous statute which leads to such a result."

(2) "It is true that the decision of the Commissioner of Internal Revenue or of any department of the Government, in construing a statute, is entitled to due consideration and much respect, but, giving the rulings of the Commissioner such weight as they are entitled to upon the facts as they appear, they cannot be permitted to govern when the proposed construction of the statute is open to the serious objections arising in the case at bar."

MEISCHKE-SMITH et al. v. WARDELL, COLLECTOR

(U. S. District Court, N. D. California, Second Div., Oct. 10, 1921)
(Not yet reported)

Memorandum Decision: Further consideration has only tended to confirm the tentative views expressed by me at the argument that these cases, so far as concerns the controlling question of the separate legal entity of the Valley Pipe Line Company as affected by ownership of its stock by the Shell Oil Company at the time the taxes sued for accrued are governed by the principles announced in Pullman Car Co. v. Mo. Pac. Ry. Co., 115 U. S. 537;

Peterson v. C. R. I. & P. Ry. Co., 205 U. S. 364; and the recent case, in the Circuit Court of Appeals of the Fifth Circuit, of Walker v. Gulf & I. Ry. Co., 269 Fed. 885; and that the facts do not bring the cases within the special and peculiar situation in that regard given affect in Southern Pacific Co. v. Lowe, 247 U. S. 330, and Gulf Oil Company v. Lewellyn, 248 U. S. 71. The latter cases will be found aptly distinguished and differentiated from the two first mentioned in Walker v. Gulf & I. Ry. Co. As this conclusion precludes recovery by plaintiffs the motion for non-suit must be granted in each case and the defendant awarded judgment for his costs.

MERRIAM v. UNITED STATES
ANDERSON v. UNITED STATES

(U. S. Circuit Court of Appeals, Second Cir., April 3, 1922)
(Not yet reported)

Record: Revenue Act of 1913. Action to recover federal income taxes. Writ of error to the U. S. District Court for the Southern District of New York, which rendered judgment in favor of the plaintiff. 275 Fed. 109, ante 577. Judgment reversed.

Facts: The will of Alfred G. Vanderbilt, who died on May 17, 1915, provided as follows: "I give and bequeath to * * * Frederick M. Davies, $500,000.00; to Henry B. Anderson, $200,-000.00; to Frederick L. Merriam, $250,000.00 * * *. The bequests herein made to my said executors are in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees." Both of the defendants qualified as executors, as did the others named, excepting Mr. Davies, who died five days before the death of the testator. These bequests were paid to the defendants in 1915. Each of the defendants made a return of his income for taxation prior to March 15, 1916, and neither included in said return the legacies so received.

Questions: (1) Were the payments in question given as consideration for services and consequently taxable as income?

(2) Were the bequests to the defendants legacies within the universally accepted and legal meaning of the term as it is used in the Revenue Act of 1913?

Decision: (1) "We think Congress contemplated and intended to cover payments under contracts of employment, expressed or implied, and intended the taxing statute to reach all forms of payment for services rendered. But this does not affect the intention of Congress that the essential factor be present that whatever is sought to be taxed under the phrase must be a consideration for work performed or to be performed, and that it must be compensation derived from or flowing from labor. * * * A legacy acquired by bequest does not proceed from labor. The question must be determined not by the phase 'in lieu of commissions,' but upon the question of whether the bequest was in fact a consideration for services to be rendered."

(2) "Bequests are either absolute or conditional, vested or contingent. It was not essential for the legatees named to qualify in order to become entitled to their legacies. A bequest to one in lieu of compensation for his services which is conditional only upon his willingness to qualify and serve if circumstances permit him to do so is nevertheless a legacy. * * * We think the whole of each legacy was payable independent of services. It was an acquisition to each legatee by bequest within the meaning of the taxing act and was therefore not taxable as income."

MIDDLETON v. MEE, COLLECTOR AND NINE OTHER CASES

(U. S. District Court, D. South Dakota, S. D., Nov. 29, 1921)
(277 Fed. 492)

Record: National Prohibition Act and R. S. Sec. 3224. In equity. On motion for preliminary injunction and motion by defendant to dismiss. Motion to dismiss denied and injunction granted.

Facts: These were separate suits brought to restrain the collector from distraining property of plaintiff to collect the so-called double tax and penalties assessed under the National Prohibition Act. In the Middleton case, which is typical of all of them, the facts were as follows: The plaintiff operated a farm. Federal agents, without his consent, searched his residence and seized cer-

tain personal property. Thereafter, plaintiff was indicted and tried on an indictment containing two counts; the first one charged him with manufacturing intoxicating liquor, and the second with unlawful possession of certain property designed for the manufacture of intoxicating liquor. The plaintiff was found not guilty of the first count and guilty of the second count. Subsequent to these criminal proceedings the plaintiff was notified by defendant that a tax had been assessed against him as a retail liquor dealer and as a manufacturer of intoxicating liquor, all in the sum of $3,474. Defendant was about to sell real estate of the plaintiff to satisfy such taxes and penalties for non-payment of same, when this bill was filed.

Question: Are the so-called taxes imposed under National Prohibition Act, Title 2, Section 35, penalties, and if so, can a suit to enjoin their collection by the collector by distraint and sale of property be maintained?

Decision: "I believe, however, that a defendant, charged with a violation of this statute, should have his day in court, and an interpretation of this statute that closes to him forever the hope of financial progress, by placing this lien against him, is to imply an intent and purpose on the part of Congress, inconsistent with the intent and purpose of the act. I am, therefore, of the opinion that such of these provisions of the Volstead Act as may be enforced against violators of that law are penalties, and not taxes; that such penalties can not be assessed by an internal revenue collector, without giving the person charged his day in court. Finally, the procedure by distraint for the collection of these penalties, as threatened in these cases, can not be sanctioned. There has been no adjudication in court as to the liability of the plaintiffs. This liability is denied. There has been no hearing. Distraint under such circumstances is not due process of law."

MILES, COLLECTOR v. THE SAFE DEPOSIT & TRUST CO. OF BALTIMORE, GUARDIAN

(U. S. Supreme Court, May 29, 1922)

(Not yet reported)

Record: Revenue Act of 1918. Suit to recover taxes paid under protest. On writ of error to U. S. District Court, District

of Maryland, which rendered judgment for the defendant in error (plaintiff below), 273 Fed. 822, ante 439. Judgment affirmed.

Facts: Defendant in error, as guardian for Frank R. Brown, an infant, sold the subscription right to 35 shares of stock of the Hartford Fire Insurance Company for $12,546.80. This right resulted from a resolution of the stockholders of the corporation, sanctioning an increase in the capital stock, and providing that the new issue should be offered to the stockholders at $150 per share, in the proportion of one share of new stock to each share of stock held by them. The cost of the old stock held by the defendant in error was $710 per share, so that, had the subscription right been exercised instead of sold, the defendant in error would have had 70 shares of stock in place of 35 shares held before, at a cost of $710 plus $150, or $860, making the cost of each share $430. The Commissioner of Internal Revenue held that the entire amount of $12,546.80 was taxable income and assessed and collected tax accordingly. The trial court held that the sale of the subscription rights at $358.48 per share, the purchaser to pay the issuing company $150 per share was equivalent to a sale of the fully paid shares at $508.48 each, or $78.48 in excess of the $430 which represented their cost to defendant in error; and this difference multiplied by 35, the number of shares or rights sold, yielded $2,746.80 as the gain realized out of the entire transaction.

Questions: (1) Is a right to subscribe to additional shares of stock income to the stockholder receiving such right?

(2) How should the gain upon the sale of rights to subscribe for stock be computed?

Decision: (1) "The right to subscribe to the new stock was but a right to participate, in preference to strangers, and on equal terms with other existing stockholders, in the privilege of contributing new capital called for by the corporation,—an equity that inheres in stock ownership under such circumstances as a quality inseparable from the capital interest represented by the old stock, recognized so universally as to have become axiomatic in American corporation law. * * * The stockholder's right to take his part of the new shares, therefore,—assuming their intrinsic value to have

exceeded the issuing price,—was essentially analagous to a stock dividend. So far as the issuing price was concerned, payment of this was a condition precedent to participation, coupled with an opportunity to increase his capital investment. In either aspect, or both, the subscription right of itself constituted no gain, profit, or income taxable without apportionment under the Sixteenth Amendment.''

(2) ''To treat the stockholders' right to the new shares as something new and independent of the old, and as if it actually cost nothing, leaving the entire proceeds of sale as gain, would ignore the essence of the matter, and the suggestion cannot be accepted. The district court proceeded correctly in treating the subscription rights as an increase inseparable from the old shares, not in the way of income, but as capital; in treating the new shares if and when issued as indistinguishable legally and in the market sense from the old; and in regarding the sale of the rights as a sale of a portion of a capital interest that included the old shares.''

MILL CREEK & MINEHILL NAV. & R. CO. v. UNITED STATES

(U. S. District Court, E. D. Penn., November 22, 1917)
(246 Fed. 1013)

Record: Section 24, Judicial Code. Sec. 3327 R. S. Action to recover taxes paid. Judgment for plaintiff. Affirmed by U. S. Supreme Court without opinion, 251 U. S. 539.

Facts: The collector to whom the taxes here sought to be recovered were paid passed out of office, and the action was originally commenced against his successor in office. It was ruled that the plaintiff had no right of action against the successor, and it then abandoned its right of action against the collector, and proceeded to exercise the privilege given it by other acts of Congress to institute an action against the United States itself as defendant.

The plaintiff ''brought suit'' or claimed to have done so, by the filing of a praecipe upon which issued a writ of summons in accordance with the established practice of the court in like suits against individuals. These writs were served, or asserted by the

plaintiff to have been served, by lodging them with the District Attorney. This was within the two-year period for bringing suit, provided for in R. S. 3227. The plaintiff deferred the filing of the statement of claim until after the expiration of the two years. The District Attorney denied, or at least doubted, his authority to recognize service of the writ upon him as bringing the United States as a defendant within the jurisdiction of the court, and refused to view the United States as being in court. When a statement of plaintiff's claim, however, was served upon him, the District Attorney recognized that this was lawful service upon the United States and brought it into court as a defendant.

Questions: (1) Does time operate to affect the remedy as one of the conditions upon which it is given, or does it operate through and by a statute of limitations?

(2) What procedure is to be followed in bringing suit against the United States in the District Court for the recovery of taxes paid?

(3) Was the action "brought" by the service of the writ of summons, or was it barred by the two-year statute because the statement of claims was filed after the expiration thereof?

Decision: (1) "The distinction indicated, though important enough in itself and carrying at times important practical consequences, does not seem to be of practical value in the instant case. A few general observations may clarify our view of the broad questions involved and thus enable us to get a clearer view of the narrower questions with which we are concerned. One of the propositions advanced by counsel for the United States is undoubtedly sound, and, as was to be expected, is admitted in all its fullness by counsel for defendant. The proposition is that the United States can not be sued, except as it may consent, and the right to sue, when given, must be exercised in compliance with the terms and conditions of that consent. * * * This immunity, however, flowing as it does from the attribute of sovereignty, does not belong to the individual tax gatherer. Whatever power he has flows from the law, and, if he asserts to the damage of anyone a power which the law has not conferred upon him, he does a wrongful act, and

the damage thereby done to another becomes a legal injury, for which the injured person has a legal right of redress against the wrongdoer. The right thus possessed is not conferred by any statute, but is a common-law right, which exists until it has been taken away or limited by statute. * * * A like obligation to return moneys to which the sovereign had no just claim would also be recognized. The general situation as thus outlined has brought about two kinds of legislation. The one is embodied in a series of acts by which the United States has expressed its willingness and consent to be made a defendant in defined cases and has subjected itself to the process of the courts. The other kind of legislation has given recognition to the claims of governmental agents to indemnity for the legal consequences of official acts performed in good faith, and provision is made for their reimbursement by the return of any moneys which they as individuals may have been compelled to pay because of what was really an official act, and actions against them are regulated. If the United States gives consent to the issuance of process against it, provided the process issues within a limited time after the claim for redress arose, this limitation is strictly a condition of the remedy given, and not a statute of limitations in bar of the action. The common-law right of action, however, to which we have adverted, being, as already observed, a right belonging to the plaintiff, exists until it is taken away by statute, and may be enforced at any time, unless and until it is barred by a statute of limitations. Such latter statutes, therefore, in reference to such common-law right of action are strictly and technically statutes of limitation, and, generally speaking, statutes of limitation which apply to other actions apply to these actions. Recurring again to actions against the United States, the right to which did not belong to the plaintiff, except as given by statute, such actions may be brought and prosecuted in accordance with the conditions of the grant of the right, and with respect to the time within which they may be brought, the United States may, if Congress so disposes, be less indulgent to itself than to other defendants.''

(2) ''Section 24(20) of the Judicial Code * * * provides a method for the assertion of claims by suit against the United States, so far as concerns the District Courts, by conferring upon

these courts, concurrently with the Court of Claims, jurisdiction of all claims against the United States (with some exceptions) which could be asserted by action if the United States was suable. It specifically prescribes no system of process to be followed by the District Courts, but the concurrence of jurisdiction with that of the Court of Claims would imply a sanction of like process, and the limitation provision in the statute carries a direct implication of the sanction of the writ of summons process. A condition of the situation, with respect to which Congress was legislating, pre-existent to the statute, may help us in construing it. The District Courts had already been constituted and had established methods of procedure and process. Courts of Claims had no such existence and, of course, no method of procedure. There was no practical necessity to enact a procedure system for the District Courts; there was such necessity to provide a system for the Court of Claims. There is room because of this for the inference (if there is verbal warrant for it in the Act itself) that it was in accord with the will of Congress that the Court of Claims should follow the mode of procedure set forth in the Act, but that the District Courts might follow their established practice, or adopt that established for the guidance of the Court of Claims. We think the above-mentioned provisions of the Act sanction this construction of it. Section 156 of the Judicial Code (Comp. St., 1916, Sec. 1147) indicates the filing of a petition by limiting the time within which it must be filed. The limitation provision of the twentieth section indicates the commencement of an action and is consistent with the thought of the issuance of a writ of summons. As the time limitation is the same in each of these sections, the coincidence suggests these different modes of procedure and provides a limitation in each case, or, in other words, in effect provides that, if the action permitted to be brought is brought through and by the writ of summons process, the closing of time upon the action is marked by the impetration of the writ, but, if the petition procedure is followed, then the date of the filing of the petition marks the time limit. In still other words, there is standing ground for the construction that if the claim is prosecuted in the Court of Claims, the filing of the petition determines the question of whether the pro-

ceeding has been begun in time, but if an action be brought in the District Court by writ of summons, the question is to be determined by the date of the writ.''

(3) ''Sections 20 and 156 of the Judicial Code each give six years' time within which plaintiffs may assert their claims by legal process. Judged by these sections, the present actions were brought in time. There are, however, other statutes limiting the time within which suits may be brought against the United States. This other provision is expressed in Revised Statute Section 3227 (Comp. St., 1916, Sec. 5950), which prescribes that no suit shall be maintained to recover payment of taxes collected without authority of law unless brought 'within two years next after the cause of action accrued.' Applying this provision to the instant cases, we find it has been complied with by the plaintiffs in each case if the issuance of a writ is a suit brought within the meaning of the Revised Statutes, but has not been complied with if the statements of claim are by this statute required to be filed within the two years. This brings us to the very narrow question involved here. That question is: Does the impetration of the writ toll the statute above quoted (if viewed as a statute of limitations), or is the issuance of the writ a compliance with the terms and conditions upon which the right of action is conferred (if viewed as a condition of the exercise of the right given)? * * * In the view of counsel for the United States, the service of the statement was in law the commencement of the proceeding, and that no suit had been 'brought' until this statement was filed. As this was more than two years after the cause of action arose, the position of counsel for the United States is that the plaintiff in each case has lost its right of action. * * * We are unable to get our mind in accord with the thought upon which this defense rests: Our view is that jurisdiction is given to the District Courts to determine the justness of claims against the United States, and that for all the purposes of procedure the United States is to be regarded as is any other defendant. It can not, of course, be made a defendant without its consent; but, when that consent is once given, the merits of the claim for which the action is permitted to be brought are to be passed upon and determined as if the claim were made against any other defendant. Had

the actions as brought been brought against a citizen, the action would have been found to have been brought in time, and the same finding must be made against the United States as a defendant. The ruling is not that a distinction could not have been made in favor of the United States, such as that for which counsel for the United States contends, but it is that no such distinction has been declared. As all of the positions taken by counsel for the United States (except the denial that the issuance of a writ is the bringing of a suit within the meaning of the Acts of Congress giving the District Courts jurisdiction of claims by actions against the United States) may be deemed well taken without affecting the conclusion reached, it is unnecessary for us to determine whether the two-year limitation applies to actions brought directly against the United States to recover excise taxes, the payment of which has been unjustly exacted, or only to those actions which have been brought indirectly against the United States through the collector being made defendant.''

MILLS WOVEN CARTRIDGE BELT COMPANY v. MALLEY

(U. S. District Court, D. of Mass., May 26, 1922)
(Not yet reported)

Record: Munition Manufacturers' Tax. Motion to set aside verdict of jury overruled.

Facts: This case arose under the provisions of Title III of the Act of September 8, 1916, and involved the question of whether the belt which carries the ammunition used in connection with the Vickers machine gun was taxable as a ''part'' or ''appendage.'' The case was tried before a jury which rendered a verdict that the cartridge belt was a ''part'' or ''appendage.''

Decision: ''The statute, considered as a whole, plainly indicated a general intention to tax profits on such articles as these cartridge belts. On one side of them profits on the gun and its parts are taxed, and on the other side, profits on ammunition. The plaintiff's contention is in effect that this belt, which is used with the gun and carries the ammunition, slips out of the tax because the language does not clearly cover it. But in view of the obvious

legislative intent underlying the statute, the words employed are not, in my opinion, so restricted and precise as to prevent giving effect to the intention. These belts were, it seems to me, properly regarded by the Department as 'parts' or 'appendages' of machine guns under the statute in question; and as such the profits upon them were taxable.''

NICHOLS, COLLECTOR v. GASTON et al., EXECUTORS

(U. S. Circuit Court of Appeals, First Cir., March 21, 1922)
(281 Fed. 67)

Record: Revenue Act of 1918. Bill for an injunction to restrain the defendant collector from collecting an estate tax. Injunction granted in District Court. Defendant appeals. Decree of District Court reversed and case remanded to that court with instructions to enter a decree of dismissal.

Facts: The plaintiffs as executors for a decedent who died on November 29, 1920, filed an estate tax return on which the Commissioner of Internal Revenue assessed a tax of $83,900.36. It was conceded that this tax was legal and proper, but the plaintiffs contended that, under Section 408 of the statute, they were given a year and 180 days after the testator's death in which to pay the tax, even though the Commissioner of Internal Revenue had not extended the time of payment under Section 406 for 180 days after its due date, and that the defendant was not authorized to enforce its collection by distraint or otherwise until after the expiration of the 180 days. The defendant collector had, on the 4th of January, 1922, and before the 180 days had expired, notified the plaintiffs that, unless the tax was paid within ten days, he would proceed to collect the same, with costs, by seizure and sale of property. The plaintiffs further alleged in their bill that they were without any legal remedy, and that irreparable injury would be sustained by the estate in the loss of interest if the money were paid before the expiration of 180 days.

Questions: (1) Did the U. S. District Court have jurisdiction over this action?

(2) Were the plaintiffs, on the facts above stated, entitled to injunctive relief?

(3) In view of Section 3224, Revised Statutes, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," can this proceeding be maintained?

(4) Was the defendant, in attempting to collect this tax, acting under color of authority?

Decision: (1) A suit in equity by the executors of an estate against the collector of internal revenue individually and as collector to restrain him from collecting a tax assessed against the estate under Title IV of the Revenue Act of 1918 is one involving a controversy arising under the laws of the United States, and hence the United States District Court as a Federal court has jurisdiction thereof.

(2) "It thus appears from the language of the Act that had the complainants paid the tax under protest at the time it was demanded, they could have recovered judgment against the collector for all damages they sustained, if the collection was premature and they were thereby damaged. * * * they would have been entitled to interest on the damages sustained down to the entry of final judgment, and * * * upon a certificate of probable cause by the court, under Section 989 of the Revised Statutes, the liability of the Government to pay the judgment would attach. * * * We are therefore of the opinion that the complainants have failed to show that they would have had no remedy at law. On the contrary, it would seem that they would have had a legal remedy by which they might have been reimbursed for all damages sustained, in case it should be found that the defendant was not authorized to demand and enforce the collection of the tax within the 180 days after it became due, and that the court below was without authority to grant the injunction, irrespective of the inhibition contained in Section 3224 of the Revised Statutes."

(3) "In view of the conclusion reached, we do not feel called upon to decide whether Section 3224 imposes upon a court of equity any greater restraint as to enjoining the assessment and collection

of a tax than it would properly be called upon to exercise had the statute not been enacted. The remedy at law is regarded as exclusive and, in the absence of extraordinary circumstances such as would warrant the interposition of a court of equity, has always been held to be exclusive. * * * It would seem, however, that the inhibition of Section 3224 applies to all assessments or collections of internal revenue taxes made or attempted to be made under color of office by internal revenue officers charged with general jurisdiction over the assessment and collection of such taxes, and that, if the Commissioner of Internal Revenue, in assessing a tax, or the collector, in collecting it, acts under color of his office, Section 3224 applies, and that no suit to restrain the assessment or collection of the tax can be maintained."

(4) In view of the provisions of Sections 404, 1305, and 1307 of the Revenue Act and Sections 3182, 3183, 3184, and 3187 of the Revised Statutes, it was the duty of a collector of internal revenue to whom the Commissioner of Internal Revenue certified an estate tax in his list for collection, to proceed to collect the tax, and such collector in demanding payment of the tax, and, on nonpayment thereof, in issuing a distraint warrant and enforcing collection, acted under color of his office and his acts were not purely ministerial.

PAGE, COLLECTOR v. POLK

(U. S. Circuit Court of Appeals, First Cir., May 16, 1922)
(281 Fed. 74)

Record: Revenue Act of 1918. Suit to enjoin the defendant collector from proceeding to collect an estate tax by distraint. Appeal from the U. S. District Court for the District of Rhode Island, which granted an injunction. 276 Fed. 128. Decree of District Court reversed and case remanded to that court with direction to enter a decree dismissing the bill with costs to the appellant in this court and in the District Court.

Facts: This suit arose by injunction brought against the collector to restrain him from collecting an estate tax assessed against the estate of the decedent in the sum of $245,787.67, under Title VI of the Revenue Act of 1918. The amount of the tax assessed was

conceded to be legal and proper but the plaintiffs contended that under Section 408 of the Revenue Act of 1918 they were given a year and 180 days after the testator's death in which to pay the tax, although the Commissioner of Internal Revenue had not extended the time of payment, as provided in Section 406, for the period of 180 days after the due date. Complainant's bill alleged that the collector was not authorized to enforce the collection of the tax by distraint or otherwise until after the expiration of 180 days, that any action by distraint or otherwise was unauthorized and not done by him in his official capacity or with color of law, that the complainants were without any legal remedy, and that irreparable injury would be sustained by the estate in the loss of interest if the money were paid before the expiration of 180 days. The bill was filed October 4, 1921, and final decree enjoining the collector was entered by the District Court on December 27, 1921. Appeal was filed and allowed on January 27, 1922. On February 10, 1922, the 180 days having nearly elapsed, complainants paid the tax to the collector.

Questions: (1) Were the complainants entitled to an injunction?

(2) The tax having been paid, should the appeal be dismissed on the ground that the questions presented thereby were academic?

Decision: (1) "The facts in this case, so far as they relate to the right of the appellees to restrain the appellant from collecting the tax, differ in no respect from those considered by us in Nichols v. Gaston et al., Executors, supra, in which it was held that the injunction was improperly issued. We see no occasion for receding from the views there expressed and are of the opinion that the appellee's motion should be denied, the decree of the District Court reversed and costs awarded the appellant in this court and in the court below."

(2) "Costs having been decreed against the appellant from which he would be relieved if the decree should be reversed, we think the case must be considered on its merits."

IN RE PAUSON'S ESTATE

PAUSON et al. v. CHAMBERS, STATE CONTROLLER

(Supreme Court of Calif., June 27, 1921)

(199 Pac. 331)

Record: California Inheritance Tax Act. Application by the controller to fix inheritance tax on property transferred in contemplation of death. Appeal from order fixing tax. Affirmed.

Facts: At the time of the transfer the decedent, Pauson, was 78 years of age and in vigorous health. He consulted an attorney, stating that it was his intention to transfer all his property to a corporation to be organized under the name of Frank Pauson & Sons. The corporation was subsequently formed and the deceased transferred to it about $600,000 of property in consideration for the entire capital stock, 40 shares of which were issued to each of his four sons and 20 each to four daughters and one share to the deceased. The shares were issued in 1915. The deceased was elected president of the corporation and voted a salary of $20,000, which was intended to cover household and personal expenses. Less than one year after the organization of the corporation the deceased died, but from a sudden acute illness.

Question: Is the finding of the trial court that this gift was made in contemplation of death sustained by the evidence?

Decision: The question of whether or not a gift is made in contemplation of death is a question of fact, and if from the evidence the trial court can properly infer that the transfer was or was not made in contemplation of death, the finding of the trial court would not be disturbed although the conclusion of the appellate court on the same evidence might be different.

In determining whether a gift was made in contemplation of death, the age of the donor, the fact that he transferred all of his property, that it was a very large fortune, and that the transfer was made for the benefit of his heirs and in such fashion that as president of the corporation he still had the management and control of his property and received from the income thereof an amount fully commensurate with his customary expenditures, are most significant.

It is clear in this case that the trial court in holding that gift in question was made in contemplation of death was amply sustained by the evidence.

PENNSYLVANIA CEMENT CO. v. BRADLEY CONTRACTING CO.

(U. S. District Court, S. D. New York, July 7, 1920)
(274 Fed. 1003)

Record: In equity. Suit by the Pennsylvania Cement Company against the Bradley Contracting Company, in which receivers were appointed for defendants. On petition of receivers therein for instructions. Instructions given.

Facts: On May 21, 1920, an order to show cause was issued, based upon the receivers' petition, which among other things prayed this court to instruct the receivers as to "the duty of the receivers in connection with any taxes payable to the United States Government * * * or any other taxes for which the receivers or this estate may be liable." The persons served with this order were also required to show cause substantially why a dividend should not presently be paid to the creditors herein. Service of this order was had upon the United States District Attorney, the Collector of Internal Revenue, and the Commissioner of Internal Revenue in Washington, as well as other parties interested.

It further appeared that the receivers had on hand a balance of cash amounting to about $500,000, but that such sum was practically all derived from payment of a certain judgment. This judgment was entered in an action brought by the defendant against the City of New York for damages for breach of a contract and most of the recovery had was for a loss of profits or gain which the defendant company would have made if it had been permitted to fulfill its contract. After receipt of this money, the receivers had applied to the Treasury Department at Washington to obtain a ruling in respect of the attitude of the Department regarding income taxes upon this money under the Revenue Act of 1918, which was in force at the time of this receipt, but the Treasury Department through the Commissioner in effect declined to make any ruling at all.

Questions: The following matters raised by the receivers' petition were presented to the court for decision:

(1) The duty of the receivers in respect to taxes claimed by or to be claimed by the United States, and

(2) The declaration of a dividend at the present time.

Decision: (1) "As to the statute itself, it must be admitted that in one sense the United States has no present claim—i. e., no presently provable claim—against these receivers, if the proceeds of the judgment against the City of New York are to be regarded as income of 1920. This necessarily follows from the fact that an income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received (or possibly accrued) to the person taxed during a certain period—i. e., the calendar year—and the year 1920 is not expired.

"Analogies are often misleading, yet I cannot but think the analogy of bankruptcy instructive. In bankruptcy it is clear law that a claim not due is not provable, and that a discharge is valid only against provable debts. Therefore, without having recourse to any of the statutes giving preference or priority to the United States, there is no claim presently existing on the part of a taxing power. It is therefore difficult for me to see how this court can at present consider the validity of a claim that does not legally exist."

With reference to the statutes directed again fiduciaries to insure their preservation of the rights of the United States the court says: "My inference from these statutes and the decisions under them is that, while receivers are not mentioned by name or title, they are within the purview of the act. It is of course possible to read these statutes so narrowly as to say that they speak always of 'debts due to the United States,' and that, therefore, if a fund be distributed when there is no debt actually due to the United States, the custodian of the fund cannot be held to a personal liability when the debt subsequently arises. But I cannot so read the statutes. * * * A fiduciary who hastened distribution before the due date of a tax, and then said, I have nothing to pay with, would, in my judgment, be personally responsible, and any court which facilitates such a distribution would be chargeable with judicial wrongdoing."

"There is another inquiry germane to this case which seems to me to be answered for this circuit by In re Heller, 258 Fed. 208, 169 C. C. A. 276, viz: If there is any income taxable or otherwise, whose is it? Is it the income of the corporation or the income of the receivers? In the case cited it was held that under the Act of 1916 (Section 13c [Coms. St. § 6336m]) only net income earned by a 'trustee while operating the business of a bankrupt corporation' was taxable. In other words, if this money is income at all, it is the receivers' income, and not that of the corporation."

This court is without present power to pass on the rights of the United States as to any sum or sums of money received by these receivers in the year 1920 and asserted to be income by the taxing authorities of the United States. "I can see no method of compelling the officers of the United States to declare a policy, give an opinion, make a promise, or obey an order in the premises until after the 15th day of March, 1921, at the earliest."

(2) The receivers were instructed to declare no dividend until further order of the court, because the United States assert a demand substantially against the fund in question which is not legally capable of present adjudication except by consent, which consent has been withheld.

PENROSE v. SKINNER, COLLECTOR

(U. S. District Court, Colorado, Aug. 22, 1921)
(278 Fed. 284)

Record: Act of October 3, 1913. Action to recover income tax paid under protest. On motion by plaintiff for judgment on the pleadings. Motion overruled.

Facts: Within the time required by the act, plaintiff made an individual return of income for the year 1913, upon which was assessed a tax of $1,919.83, which the plaintiff paid. The net income on which the first assessment was paid was obtained by deducting from the gross a large amount as losses sustained and "incurred in trade" on account of corporate stocks owned by plaintiff, some of which were represented as worthless and others as worth far less than cost. After investigation these losses were all disallowed by

the Commissioner and a second assessment upon the full amount disallowed as losses was made. The plaintiff applied for a remission of this assessment; a hearing was had; and the point at issue was, whether the facts presented by the plaintiff brought him within the class of persons whose occupation permitted them, under treasury rulings, to claim the deduction of "losses actually sustained during the year, incurred in trade;" i. e., whether plaintiff was a licensed broker or member of a stock exchange engaged in buying and selling securities for himself and others. In March, 1916, plaintiff's application was sustained and the second assessment entirely remitted by Commissioner Osborn.

In December, 1918, Commissioner Roper reassessed the amount claimed as losses and again plaintiff made application and presented proof for remission of this assessment, on the same ground, but Commissioner Roper denied the application, his reason therefore being that plaintiff was "neither a licensed broker nor a member of any stock exchange engaged in buying and selling securities for others as well as yourself." Plaintiff subsequently paid the tax with interest under protest and thereafter brought this action.

Questions: (1) Was the ruling of Commissioner Osborn in March, 1916, remitting the assessment, final and conclusive, so that the subsequent act of Commissioner Roper in making a reassessment was void?

(2) Was the reassessment not made within the statutory time and so void?

(3) Assuming that propositions (1) and (2) are decided in favor of the plaintiff would that dispose of his motion for judgment?

(4) Has Section 250d of the Act of February 24, 1919, which provides that, no suit or proceeding for the collection of any income tax shall be brought after the expiration of five years from the date when the return was due or was made, any application to this suit?

Decision: (1) "If it were necessary to pass upon the first proposition noted above I would, in the light of present investigation, decide the question with the plaintiff. No authority has been vested in a Commissioner to overrule and reverse the action of his

predecessor in office. Commissioner Osborn, acting under his authority, heard and determined a question of fact necessary to enable him to act intelligently in ascertaining and determining the amount of plaintiff's net income on which he would be required to make the levy and assessment, and his finding on that issue not having been impeached by the answer should, under every principle and rule of law, be regarded here as final." * * *

(2) "And on the second proposition above noted I would hold against the contention of the plaintiff, if it were now necessary to definitely rule upon it."

(3) "But in my judgment, if both propositions were determined in favor of plaintiff that would not dispose of his motion for judgment; for the answer sets up facts in defense that do not appear to have been investigated, considered and determined at the hearing before Commissioner Osborn." (The answer set up that some of the losses claimed by the plaintiff had been sustained before March 1, 1913, and that certain other pretended losses were false.) "The proof presented by plaintiff at that time" (before the Commissioner at the hearing) "discloses that the one question of fact under consideration was, whether he came within the class of persons entitled to claim the losses under the ruling theretofore made by the departmend and noted above. It was assumed that they had been sustained and incurred within the tax year, as claimed by the plaintiff in his return. The answer in effect alleges that the return was false in that respect; and if false, the deductions claimed should not have been made, and the tax which the plaintiff now seeks to recover was justly exacted from him regardless of whether an assessment had or had not been made." * * *.

"The Act of October 3, 1913, requires that every citizen having the necessary net income shall pay the tax annually, and if the deductions claimed in the return were not allowable as losses sustained and incurred within the tax year, it was the duty of the plaintiff under the Act to pay the amount which he now sues to recover. If it had not been paid it might have been recovered by an action against him, even though the reassessment made by Commissioner Roper was a void act on his part, U. S. v. Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204; and if recoverable against

him in an action brought for that purpose there can be here, of course, no implied promise for its return."

The period of limitations fixed in Section 250d of the Act of February 24, 1919, has no application here because this is not a suit or proceedings for the collection of a tax.

"The plaintiff's motion for judgment in his favor on the pleadings must be overruled."

PEOPLE v. TAVENER et al.

(Supreme Court of Ill., Dec. 22, 1921)
(300 Ill. 373, 133 N. E. 211)

Record: Illinois Inheritance Tax Act. Action by the State to charge defendants with taxes on tracts of land conveyed to them by their father. Judgment for the State, and defendants appeal. Affirmed.

Facts: The decedent, Charles Ruff, was the owner of 640 acres of land. He lived on the home place and his children, the defendants, lived on and farmed other portions. The understanding between decedent and his children was that the children were to have the several tracts respectively occupied by them upon the death of the father. In 1919 Ruff, after an acute attack of diabetes from which disease he had been a sufferer for 3 or 4 years, executed four deeds, conveying portions of the land to the children, stating that he was then making the deeds of what was coming to them when he died. Ruff died in 1920 at 76 years of age.

Question: (1) Were the conveyances in question made in contemplation of death?

(2) Assuming that the conveyances were made in contemplation of death is their taxable status affected by the understanding or agreement between the grantor and grantees described above?

Decision: (1) The age of the grantor, his physical condition, the existence of the disease of such a character as was practically certain to result in his death, and his apprehension that death was impending, make it certain that the deeds were made in contemplation of death.

(2) The understanding between the father and defendants that each of the children was to receive his portion of the land at the father's death and in the meantime was to pay rental to the father, was not a binding agreement for the conveyance of the land to the children before his death, but could have been performed by devising the land to the children, and therefore did not prevent the conveyances of the land in the grantor's lifetime, but in contemplation of death, from being taxable.

PEOPLE ex rel. STAFFORD v. TRAVIS
(Court of Appeals of N. Y., May 31, 1921)
(231 N. Y. 239, 132 N. E. 109)

Record: New York Income Tax Law. Appeal from an order affirming a determination of the State Comptroller assessing a tax against the relator, Stafford. Reversed and remitted to Comptroller.

Facts: The relator was a resident of Connecticut doing business in 1919 and since, in New York City. On June 16, 1920, he made a return of income for the year 1919 and paid his tax under protest. He thereupon applied to the comptroller for a revision of his tax and upon denial of his petition by the comptroller after a hearing, he obtained a certiorari to review such decision.

Question: May a state validly compel nonresidents doing business within its boundaries to pay a tax upon the net income of such business?

Decision: The tax in question is imposed upon business done by a nonresident in this state no greater in any respect than the tax imposed upon the conduct of such a business by a resident of the state. It is measured by a percentage on the net income of the business. Such a tax is just and constitutional.

However, since there was evidence that part of the relator's sales were made outside of New York, the proceeding is remitted to the comptroller to determine if such sales were consummated outside of this state, and if so, to adjust the amount of the net income of the relator from such sales according to the proportionate amount of business done in making the purchase of the goods, and forwarding the same in the city of New York, and the sales made outside of the state of New York.

PLANT v. WALSH, COLLECTOR

(U. S. District Court, D. of Conn., April 12, 1922)
(280 Fed. 722)

Record: Act of October 3, 1913. Action to recover income taxes assessed in 1916 for the years 1913 and 1914 and paid under protest.

Facts: The facts in this case are presented under the headings "Question" and "Decision" below.

Question: (1) Was the taxpayer rightly assessed on the sum of $60,455.61 representing corporate dividends declared prior to March 1, 1913, and payable subsequent to March 1, 1913, to stockholders of record at dates prior to that time?

(2) Was the taxpayer rightly assessed on the sum of $95,820, representing interest due March 1, 1913, on certain corporate bonds?

(3) Was the taxpayer entitled to deduct on his return for the year 1913, the sum of $43,749.16, alleged to be five-sixths of the amount at which certain bonds ascertained to be worthless during the year 1913 and charged off on December 31 of that year, stood on the taxpayer's books on March 1, 1913, or may he charge off only the amount of the actual value of the bonds on March 1, 1913?

(4) Was the taxpayer entitled to deduct losses sustained in the years 1913 and 1914, in the operation of a farm, as business expenses?

Decision: (1) The first question has been decided by the Circuit Court of Appeals for the Second Circuit in United States v. Guinzburg, —Fed.—. "It was held there that corporate dividends declared February 17, 1913, payable July 1, 1913, to stockholders of record on January 30, 1913, were income when declared and not when paid. * * *. It follows, therefore, that the ruling in the Guinzburg case must be followed in the instant case."

(2) "Another question is whether the taxpayer was rightly assessed on the sum of $95,820, representing interest due March 1, 1913, on certain corporate bonds. * * *. I think that as to this question United States v. Guinzburg, supra, is conclusive. The basis of that decision was that money owing to the taxpayer is income accrued from the time when the liability to pay becomes absolute,

though it is not yet due. If the interest was payable for the six months ending February 28, 1913, the liability to pay became absolute before the commencement of the taxable period though payment was not due until the first day of that period. I see no ground on which money owing by a corporation for interest on its bonds can be distinguished from money owing it for a dividend which has been declared on its stock, and therefore hold that on this item also the taxpayer was improperly assessed.''

(3) Upon the next question, namely, the legality of the deduction of $43,749.16, as a loss on worthless bonds, the court points out that the Act of 1913 permitted the deduction of ''Debts due to the taxpayer actually ascertained to be worthless and charged off within the year,'' and that for the year ending December 31, 1913, five-sixths only of the deduction provided for by that Act were to be allowed. ''The plaintiff contends that all the statute requires him to prove is that the debt was ascertained to be worthless and charged off within the year 1913. This he has done by the undisputed evidence. The effect of so construing the statute may be to permit the taxpayer to deduct five-sixths of a loss accruing prior to the commencement of the taxable period, so that the return will not reflect his entire income for that period. But Congress has the right to do this and has done it if the statute is to be literally construed. In case of doubt a tax law should be construed in favor of the taxpayer. Gould v. Gould, 245 U. S. 151. Therefore, I conclude that the taxpayer's contention should be sustained. But even if the burden is on him to prove the value of the bonds on March 1, 1913, I think he has met the burden because the amount at which the bonds stood on his books on March 1, 1913, is at least prima facie evidence of their actual value at that time.''

(4) ''The plaintiff also complains of the refusal to allow as deductions the losses sustained by Mr. Plant in the years 1913 and 1914 in the business of farming. * * *. The only question involved in connection with this claim is whether Mr. Plant was engaged in farming as a business or merely for pleasure. The evidence shows that he had been engaged in farming since 1904 or 1905. He kept increasing the size of his farm until in 1912 it numbered several hundred acres. He had not made any profit on

his farm prior to or during 1914, but in 1912 he formed an organization of experts for the purpose of putting the farm on a business basis and installed an elaborate accounting system under the supervision of a comptroller. Large quantities of farm produce were marketed at prevailing prices and every effort was made to establish the farm's reputation as a high class modern farm. Mr. Plant gave a good deal of his time to bringing about efficiency and putting the farm on a paying basis. Notwithstanding these efforts the operation of the farm resulted in a loss for 1913 of $107,680.70 or about 200 per cent. of the receipts and in 1914 of $106,431.98, including depreciation, or about 150 per cent. of the receipts.''

The court then alludes to the argument of the defendant that the great excess of expenses over receipts proved that farming was a pleasure or hobby with Mr. Plant and not a source of profit and therefore the expense of conducting the farm was not a business expense. ''I think however, that the evidence establishes clearly that Mr. Plant's farm was conducted as a business enterprise and with the expectation that it would eventually become profitable. The mere fact that a heavy loss was incurred in the initial stages of so large an enterprise does not necessarily show the contrary. But even though this is not so, I do not believe that farming when engaged in as a regular occupation and in accordance with recognized business principles and practices, is any the less a business within the meaning of the statute because the person engaging in it is willing to do so without regard to its profitableness because of the pleasure derived from it.''

PLUMMER v. COLER

(U. S. Supreme Court, May 14, 1900)
(178 U. S. 115)

Record: Inheritance Tax Law of New York. Error to Surrogate's Court, County of New York, State of New York, affirming an order imposing the tax. Judgment affirmed.

Facts: By the will of a decedent, $40,000 in United States bonds was bequeathed to the executor in trust, in giving the beneficiaries a life interest in the income. The value of this life interest

was computed by the appraisers at $16,120, and a tax of $161.20 assessed.

Question: Under the Inheritance Tax Law of a state, may a tax be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form?

Decision: "We think the conclusion, fairly to be drawn from the state and federal cases, is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of federal securities, does not invalidate the tax or the law under which it is imposed."

THE PROCTOR & GAMBLE CO. v. UNITED STATES
THE BUCKEYE COTTON OIL CO. v. UNITED STATES

(U. S. District Court, S. D. of Ohio, W. D.)
(281 Fed. 1014)

Record: Revenue Acts of 1917 and 1918. Suits to recover taxes paid under Title V, Sections 500-503 of the Act of 1917 and Title V, Sections 500-502 of the Act of 1918. In each case demurrers were filed to the petition. Demurrers sustained.

Facts: See Questions below.

Questions: (1) Should demurrage charges for failure to load and unload cars within the "free time" allowed by the rules of railroad companies be included as part of the cost of transportation and thereby subject to the transportation tax?

(2) Is a petition for recovery of a tax bad on demurrer if it does not contain averments showing that payment was made under protest or duress?

Decision: (1) "Demurrage is a terminal charge—a part of the charge for transportation."

(2) "On the averments made in their respective petitions payments were not made under protest or duress, but voluntarily. Recovery therefore cannot be had."

PUBLIC SERVICE CORPORATION v. HEROLD

(U. S. Circuit Court of Appeals, Third Cir., Feb. 23, 1922)
(279 Fed. 352)

Record: Revenue Act of 1916. Action to recover taxes paid under protest. Judgment for defendant. 273 Fed. 282, ante 415. Judgment reversed.

Facts: In a suit brought against the defendant collector to recover taxes illegally collected under the Revenue Act of 1909 (Public Service Company v. Herold, 229 Fed. 902, ante 416), it was held that taxes paid for the years 1909 and 1911 could not be recovered because no claim for refund had been made within the two years provided by Sec. 3228, R. S. The Act of 1916, subsequently passed, contained a provision that taxpayers shall be permitted to present a claim for refund of taxes overpaid under the Act of August 5, 1909, notwithstanding the provisions of Sec. 3228, R. S. Acting under the supposed authority of this Act, the plaintiff filed claims for refund of the taxes in question, which claims were finally rejected by the Commissioner in December, 1917, whereupon this suit was brought.

Question: (1) Did the Revenue Act of 1916 remove the bar of Sections 3227 and 3228, Revised Statutes, so as to give the plaintiff a right of action against the collectors where tax was illegally exacted which otherwise would have been barred by said sections?

(2) Was the defense of res adjudicata available to the defendant?

Decision: (1) The Act of 1916, permitting a taxpayer to file a claim for refund of taxes collected under the 1909 and 1913 Acts, notwithstanding Sec. 3228, R. S., permits a suit to recover taxes unlawfully collected where the claim for refund made thereunder was erroneously rejected by the collector. The cause of action for such taxes accrues at the time of such rejection within Sec. 3227, R. S., requiring suit to be brought within two years after the cause of action accrues. The subject matter of R. S. 3228 and the Act of 1916 lifting the two year limitation thereunder was refunding claims made to the Commissioner, and not suits. The Act of 1916

made no change with regard to the limitation of suits provided for in R. S. 3227.

(2) The United States having given, by the Act of 1916, the plaintiff statutory authority to bring this suit, it thereby signified that it did not stand on any previous litigation between it and the taxpayer to create the defense of res adjudicata.

PUMMILLI v. RIORDAN, COLLECTOR

(U. S. District Court W. D. New York, June 24, 1921)
(275 Fed. 846)

Record: Section 35, National Prohibition Act. Bill to enjoin collection of taxes and penalties. Motion for injunction denied. Motion for rehearing denied, and all injunctions vacated.

Facts: The defendant collector assessed taxes and penalties against the plaintiff under Section 35 of the National Prohibition Act, in the amount of $533.76. The plaintiff sought to restrain the assessment on the ground that it was for violation of a criminal statute, and not for violation of any revenue laws, and accordingly was not lawful and not legally collectible.

Question: May the assessment and collection of taxes and penalties under Section 35, National Prohibition Act, be restrained?

Decision: As the provisions of the Internal Revenue Act for collection apply to the taxes and penalty under the National Prohibition Act for illegal manufacture and sale, collection thereunder cannot be restrained; there being adequate remedy by proceedings to obtain a refund and subsequent suit, if necessary, for recovery.

RAND v. UNITED STATES

(U. S. Supreme Court, April 21, 1919)
(249 U. S. 503)

Record: Inheritance Tax Act of June 13, 1898, R. S. Sections 3226 and 3228, and Acts of June 27, 1902, and July 27, 1912. Suit to recover inheritance tax paid. Appeal from decision of the Court of Claims dismissing the suit. Judgment affirmed.

Facts: Under the will of one Edmund Dwight, who died in 1900, a trust fund was created for the benefit of Jennie Rand. In

1900 the executrix of the estate made a return of the legacies in her charge and included therein the legacy to Mrs. Rand. Apparently without any demand from the collector or other officer the executrix paid a tax upon this legacy amounting to $3,026.69. Under authority of the Act of July 27, 1912, the New England Trust Co., the trustee under the will of Dwight, by its attorney, filed on December 24, 1913, with the Commissioner a claim for refund of the tax. And on December 30, 1913, attorneys acting for the administrator de bonis non of Dwight also filed a claim for refund. These claims were rejected. It was not shown that Mrs. Rand, the plaintiff in this suit, or any person acting for her, had filed any claim.

Questions: (1) Is the plaintiff's action barred by R. S. Sections 3226 and 3228?

(2) Is recovery of the tax barred by reason of the fact that it was paid voluntarily?

(3) Does the claim filed by the trust company or the claim filed on behalf of the administrator de bonis non satisfy the requirements of the Act of July 27, 1912, that repayment shall be made to "such claimants as have presented or shall hereafter so present their claims" in a suit for recovery of the tax brought by the cestui que trust?

Decision: (1) "There is no question that the cited sections" (section 3 of the Act of 1902 and section 2 of the Act of 1912) "remove the bar of sections 3226 and 3228 if appellant has met their requirements and presented to the Commissioner of Internal Revenue a claim for the refund of the tax."

(2) "Nor is the fact that the tax was voluntarily paid, that is, without protest, an impediment to the application of the Act of 1912."

(3) The court denied the contention of the counsel for the plaintiff that the claims made by the trustee and the personal representative of the deceased should be ascribed to Mrs. Rand and also held that the inutility of filing a claim by her, based on the fact that she knew the precise facts of the claims that had been made, and that claims of the class to which hers belonged had been uni-

formly rejected and that another claim in her name would be a "useless ceremony," could not justify her failure to file a claim in her name. "It" (the statute of 1912) "had its purpose and is not satisfied by representative or negative action; it requires a positive and individual assertion or claim. * * * It says to the taxpayer: Make a claim for the tax you have paid, show its illegality and it will be repaid to you. We can not relax its requirements—certainly not on the assumption that they might have been useless if complied with."

RAYMER v. TREFRY

(Supreme Court, Massachusetts, September 16, 1921)
(132 N. E. 190)

Record: Massachusetts St. 1919, C. 324, and 44th Amendment to Massachusetts Constitution. Proceeding for abatement of a tax. Motion for amendment denied and judgment ordered for defendant.

Facts: Respondent, as Commissioner of corporations and taxation, assessed against plaintiff's taxable income, consisting of his salary as associate professor in Harvard University, a tax of one and one-half per cent, assessed in accordance with St. 1916, C. 269, Sec. 5b, which was conceded to have been valid; but a further tax of 1 per cent amounting to $10.99, levied under St. 1919, C. 324, which provided that, in addition to other income taxes theretofore required, "an additional tax of 1 per cent on all income received during the calendar years 1918 and 1919 taxable under the provisions of par. (b) of Section five of said chapter" should be levied, was the subject of this action. The 44th Amendment to the Massachusetts Constitution provided that income tax "may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general courts may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements."

Question: Was the income on which the plaintiff was taxed "not derived from property" as those words are used in the 44th Amendment to the Constitution?

Decision: "The words of this amendment, like all constitutional provisions are to be interpreted as expressing comprehensive principles of government. They are not to be given a narrow or constricted signification. They have meaning in accordance with the common understanding at the time. They are to be construed in such way as to carry into effect what seems to be the reasonable purpose of the people in adopting them. * * * The Constitution and its amendments are also to be construed as an harmonious whole. Words occurring in different places in the Constitution and its amendments ordinarily should be given the same meaning unless manifestly used in different senses. It has already been held that this amendment is to be interpreted so as to include every item of wealth accruing to the taxpayer during a stated period which can be fairly regarded as income. * * * The words 'income not derived from property' and 'income derived from property' in the Forty-fourth Amendment are to be interpreted in the light of these principles. The word 'property' occurs in several places in the Constitution and its amendments both of this commonwealth and of the United States. Property is a word of large importance. It has been interpreted as including the right to make contracts for labor and for personal service. * * * It is not open to question that contracts for labor and service are property within the meaning of that word in both the federal and state constitutions and as such they are entitled to the protection of the numerous guaranties thereby afforded. It would be a strained and unnatural construction to hold that that which was 'property' for the purposes of the protection afforded by the Constitution was not 'property' for the purposes of the taxation of income 'derived from property' authorized by an amendment to this same instrument. There are other classes of income which may be thought to be 'not derived from property.' Hence these words in the amendment may be given force and effect if and when the general court shall make such classification for purposes of taxation. The decision of this point is decisive against the complainant and it becomes unnecessary to consider the other contentions made in his behalf."

ROCKEFELLER v. UNITED STATES
NEW YORK TRUST COMPANY, ETC., EXECUTORS OF HARKNESS v. EDWARDS, COLLECTOR

(U. S. Supreme Court, Nov. 21, 1921)
(Not yet reported)

Record: Act of October 3, 1913. Two writs of error to the District Court for the Southern District of New York to review judgments sustaining assessments of income taxes. Affirmed. See same case below, 274 Fed. 952, ante 367.

Facts: The Prairie Oil & Gas Company, a Kansas corporation, caused a new corporation to be organized in the winter of 1914-1915 under the laws of Kansas, to be known as the Prairie Pipe Line Company, to which all the pipe line property of the Prairie Oil & Gas Company was transferred in consideration of the issue and delivery of the entire capital stock of the new company, to be distributed to the stockholders of the Prairie Oil & Gas Company. In the case of the Ohio Oil Company, an Ohio corporation, there was a similar transaction, except that under the contract between it and the Illinois Pipe Line Company, the new Ohio corporation organized by it, the shares of stock of the new company were issued direct to the old company. However, the directors of the old company in the same resolution which accepted the contract declared a dividend of these shares to its stockholders. Messrs. Rockefeller and Harkness were holders of large amounts of stock of both the Prairie and Ohio Oil companies, and in the distribution each received an amount of stock in each of the pipe line companies proportionate to his holdings in the oil companies. In the case of both oil companies the properties conveyed represented a surplus above the par value of the oil companies' stock, and the conveyances, therefore, left the said companies' capital unimpaired and required no reduction of their authorized issues. Income tax assessments for the year 1915 were imposed upon Messrs. Rockefeller and Harkness, based upon the value of the stock thus received as dividends.

Question: Did the distribution of the stocks of the pipe line companies among the stockholders of the oil companies constitute

dividends under the meaning of the Act of 1913, and income within the meaning of the Sixteenth Amendment?

Decision: The facts are in all essentials undistinguishable from those presented in United States v. Phellis. The new stock represented assets of the oil companies standing in place of the pipe line properties that before had constituted positions of their surplus assets, and it was capable of division among stockholders as the pipe line properties were not. "The distribution, whatever its effect upon the aggregate interests of the mass of stockholders, constituted in the case of each individual a gain in the form of actual exchangeable assets transferred to him from the oil company for his separate use, in partial realization of his former indivisible and contingent interest in the corporate surplus. It was in substance and effect, not merely in form, a dividend of profits by the corporation, and individual income to the stockholder.

"The opinion just delivered in United States v. Phellis sufficiently indicates the grounds of our conclusion that the judgment in each of the present cases must be affirmed."

SAGE et al., EXECUTORS v. UNITED STATES
(U. S. Supreme Court, May 19, 1919)
(250 U. S. 33)

Record: Act of June 13, 1898. Act of June 27, 1902. Act of July 27, 1912. Action to recover taxes paid. Appeal from decision of Court of Claims dismissing the petition on demurrer. 53 Ct. Cls. 628. Judgment reversed.

Facts: The testator died on June 23, 1902, so that the debts of the estate were not ascertained and, as decided in McCoach v. Pratt, 236 U. S. 562, the legacies were not "absolutely vested in possession or enjoyment" before July 1, 1902; and therefore by the terms of the Act of 1902 were not subject to the tax under the Act of 1898. A tax of $63,940.88 was collected, however, in June, 1903. A claim for refund was filed on August 24, 1903, but was denied in the following month. Two years later petitioners sued the collector, and in 1912 got judgment for $30,275.49, with interest and costs, which was satisfied by the United States. This suit for the unrepaid residue was begun on January 23, 1917.

Questions: (1) Was the former judgment a bar to this action?

(2) Was the filing of a new claim under the Act of July 27, 1912, a condition precedent for the recovery of the amount here sued for?

(3) Was this action barred by the statute of limitations?

Decision: (1) "The former judgment is not a bar. * * * No one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. * * * The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different."

(2) "The claimants presented their claim, and so had complied with the letter of the act. But it is said that they filed it simply as a prerequisite to their suit against the collector and that its effect was extinguished by the judgment in that suit. This argument reads into the words of the statute what is not there and reads what was there out of the claim. * * * It did not have to be a claim under the act as the statute in terms contemplated that it might have been presented before the statute was passed. But if the presenting was sufficient before the suit was brought it is sufficient now. The statute of course does not confine its act of justice to unrejected claims."

(3) "The Act of 1912 applied in terms to 'all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected' under the above mentioned Sec. 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run. After the act was passed an application was made on September 7, 1916, to the Secretary of the Treasury for repayment of the residue of the erroneously collected tax. It was rejected on October 30, 1916, on the mistaken ground that the judgment against the collector finished the matter. This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. Stats. 1069, for suit in the Court of Claims."

SCHAFER v. CRAFT, COLLECTOR

(U. S. District Court, W. D. Kentucky, April 21, 1906)
(144 Fed. 907)

Record: Oleomargarine Act of August 2, 1886. Action to recover special tax and penalty paid. Judgment for plaintiff as to the penalty only.

Facts: A special tax of $48 was assessed against plaintiff as a retail dealer in oleomargarine. A penalty of 50 per cent, for nonpayment of the special tax when due, was also assessed. Both the tax and the penalty were paid under compulsion, and this action was brought for their recovery. Upon the trial, the court found that the plaintiff was in fact liable for the special tax.

Questions: (1) If the tax paid was lawfully due could it be recovered simply because, as the plaintiff contended, the Commissioner had no authority under the Oleomargarine Act to make the "assessment?"

(2) Was the penalty recoverable?

Decision: (1) "We might not in any event agree to this view, but have concluded that it is wholly unnecessary to pass upon the question because upon the most familiar principles one cannot by suit recover any taxes once paid, which in fact were due even though the exact manner of their collection was not authorized. And, indeed, one must first pay taxes which are due in fact before he can recover any that were exacted which were not due."

(2) "But as to the $24 collected as a 50 per cent penalty different questions arise. * * * Certainly there is no provision in the oleomargarine legislation itself, which in terms authorizes an assessment by the Commissioner of such or indeed of any penalty for nonpayment of a special tax. * * * The court is constrained to hold that section 3176, Rev. St., not being included in the sections expressly made parts of the Oleomargarine Act is excluded; and consequently there was no warrant of law for assessing that 50 per cent penalty in this instance, and for that reason has concluded that the plaintiff is entitled to recover from the defendant $24 with interest thereon from December 17, 1903, until paid and costs."

SCHUSTER & COMPANY, INC. v. WILLIAMS, COLLECTOR

(U. S. Circuit Court of Appeals, Seventh Cir., January, 1922)
(Not yet reported)

Record: Revenue Act of 1918. Action to recover taxes paid under protest. On writ of error to the U. S. District Court for the Western District of Wisconsin, which rendered judgment for the defendant. Judgment affirmed.

Facts: The plaintiff, a Wisconsin corporation, made its Federal income tax return for the calendar year 1918 on the accrual basis and one of the deductions was the income tax of the State of Wisconsin at the rate in effect December 31, 1918. The Wisconsin legislature passed a "Soldiers' Bonus" Act on July 30, 1919, which provided for the raising of the entire bonus by one tax levy, of one mill on all assessed property for the year 1919, and a surtax over the normal tax upon incomes of corporations on the basis of Wisconsin income tax return for the calendar year 1918. The Act by its terms did not become effective until ratification by popular vote which occurred October 10, 1919. Upon the favorable vote on the Act, the plaintiff filed an amended Federal Income tax return for the year 1918 wherein its Soldiers' Bonus Tax payable on the basis of the Wisconsin income tax return was additionally included in the deduction of "reserve for taxes."

Question: (1) Was the Wisconsin Soldiers' Bonus Tax of 1919 accrued in 1918 so as to be deductible from the gross corporate income for 1918?

Decision: (1) "There is no necessary relation between the basis for the levy, and the time of the accrual of the tax. Whether computed on a property assessment or a state income tax return, the tax did not accrue until it became a liability to the taxpayer. Since the Act creating the tax was not passed until after the Federal income tax year of 1918, this Soldiers' Bonus tax can in no sense be deemed to have accrued during the calendar year prior to that of its passage."

SECURITY SAVINGS & COMMERCIAL BANK v. DISTRICT OF COLUMBIA

(Court of Appeals of District of Columbia, March 6, 1922)
(279 Fed. 185)

Record: Act of July 1, 1902, Section 6, par. 7, as amended by Act of April 28, 1904. Action to recover a tax paid under protest. From a judgment dismissing the cause, plaintiff appeals. Affirmed.

Facts: The appellant is a savings bank, incorporated under the laws of West Virginia, and doing business in the District of Columbia. Pursuant to the act named above a tax was levied upon the gross earnings of the bank. These earnings included $16,517.33, interest derived from liberty bonds and other United States securities exempt from tax. The bank claiming the tax was void instituted this suit.

Question: Is the tax invalid as a tax on property?

Decision: The act in question imposes upon the corporation the duty of paying the tax, and provides that the amount shall be determined by the sum of gross earnings. "If there are no earnings, there will be no tax, no matter how much property the corporation may own, and there will be no earnings unless business is done. The amount of the tax fluctuates with the quantity of business transacted, and is measured by it. This indicates an intention to tax the doing of business, and not the property; hence the tax is a franchise tax."

SHWAB v. DOYLE, COLLECTOR

(U. S. Supreme Court, May 1, 1922)
(Not yet reported)

Record: Revenue Act of 1916. Action to recover an estate tax paid under protest. Error to the U. S. Circuit Court of Appeals, Sixth Circuit, which affirmed a judgment of the U. S. District Court, W. D. Michigan, S. D., in favor of the defendant. 269 Fed. 321, ante 451. Judgment reversed.

Facts: On April 21, 1915, a decedent executed a trust deed conveying certain securities. She died on September 16, 1916, seven days after the passage of the Estate Tax Act, possessed of

an estate of $800,000. Under the assumption that the provision in the Act relating to transfers in contemplation of death made within two years prior to death, without consideration, was applicable to the deed in question, a tax was assessed and exacted from the plaintiff in error, as executor of the estate, in the sum of $56,548.41. This tax was paid under protest, and this action commenced for its recovery.

Question: Was the provision in the statute taxing transfers made in contemplation of death retrospective in its operation?

Decision: "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. * * * There is absolute prohibition against them when their purpose is punitive; they then being denominated ex post facto laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated. The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong, and imperative,' which is the condition expressed in United States v. Heth (3 Cranch 398, 415; also United States v. Burr, 159 U. S. 78, 82-83). If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected. * * * If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918 it re-enacted Section 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether 'made or created before or after the passage of' the Act. And we can not accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. * * * There are adverse considerations and the Government has urged them all. * * * We need only say that we have given careful consideration to the

opposing argument and cases, and a careful study of the text of the Act of Congress, and have resolved that it should be not construed to apply to transactions completed when the Act became a law."

SLOCUM v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York, June 20, 1922)
(Not yet reported)

Record: Revenue Act of 1918. Action to recover Federal estate taxes alleged to have been erroneously assessed and collected. Judgment for plaintiff.

Facts: The plaintiff filed a Federal estate tax return showing a net estate of $8,568,079.55, upon which the total tax due would be $1,406,977.50. The Commissioner of Internal Revenue revised this tax by deducting from the bequests for charitable purposes, which were deductible from gross estate under Section 403(a) (3) of the Revenue Act of 1918, the amount of state transfer taxes, viz., $5,741.83, payable under clause 6 of the will from the residuary estate which went to charity. He also deducted from the residuary estate going to charity the Federal estate tax. This lessened the amount of the charitable bequests which are made deductible in computing the net estate subject to the estate tax and increase the tax accordingly. The sum of $413,629.62 and interest is the amount of overpayment now sought to be recovered.

Questions: (1) Should the deduction of "the amount of all bequests, legacies, devises or gifts" provided for in the statute be reduced by the amount of the Federal estate tax thereon?

(2) Should the deduction of "the amount of all bequests, legacies, devises or gifts" provided for in the statute be reduced by the amount of the state legacy tax payable out of the general estate under clause 6 of the will?

Decision: (1) "The charitable recipients of the testator's bounty ultimately receive only a balance constituted after the Government has taken out the estate tax levied as an excise tax upon the privilege granted to the testator of transmitting his property at death. In the case of an estate bequeathed to a single indi-

vidual the estate tax might have been computed upon what he would receive after the estate had suffered diminution by the tax itself but such has never been the practice, and the uniform theory has been that the estate passing was to be treated without regard to the incidence of the tax itself. I see no reason why a different rule should be adopted in dealing with the words 'the amount of all bequests, legacies, devises or gifts' even when applied to a residue to charity. In the first case if the taxes had been computed upon the amount actually passing after deducting the tax millions of dollars would have been saved to taxpayers. It does not seem consistent to look at the matter in a different way in dealing with the present case, particularly in view of the liberal legislation enacted in aid of charitable gifts."

(2) "The state legacy tax amounting to $5,741.83 payable out of the general estate under clause 6 of the will would not, under the New York decisions be deductible from the residuary estate in appraising the value of that estate for the purpose of transfer taxes. Matter of Swift, 137 N. Y. 77. The Government in this case wishes to increase the net taxable estate by reducing the deductible residuary bequests to charities which have to pay this $5,741.83 to the extent of that sum. In my opinion the decision of the New York Courts in construing the transfer tax act should not control the present situation. If the New York Courts had reached any other decision than the one they did and had held that a direction to pay a tax upon a legacy to A out of the general estate lessened the general estate for purposes of taxation by the amount of the tax on A's legacy, the effect would have been to free the estate from any tax on the amount saved to A by the direction that the tax on his legacy should be paid from another fund. Such a result was unreasonable, and the New York Court properly held was not within any justifiable construction of the statute. In the present case, however, there is a direction under clause 6 of the will that taxes on legacies to certain individuals should be paid out of the general estate. It may well be that this direction should not affect the amount or method of ascertaining any legacy tax, but where the deduction allowed for charitable bequests in computing the net taxable estate is limited to the amount of such bequests a specific

charge by the terms of the will upon a portion of the estate bequeathed to charity alters the plain testamentary disposition of the testator's property to that extent and limits the amount of the charitable bequests pro tanto. It will be said that if the subtraction of the amount of all bequests to charity is to take into account legacy taxes payable out of such bequests by the terms of the will, it should take into account the Federal estate tax which is a legal charge upon the estate. I do not think the cases are parallel. The testator by her own direction limited the amount which the residuary legatees would receive by the legacy taxes. On the other hand, the uniform practice has been to disregard the Federal estate tax itself in determining the net estate. It is reasonable to apply the same rule in determining what is the residue which the testatrix gave to charity for the purpose of claiming the statutory deduction. * * * The motion for judgment dismissing the amended complaint is denied, and judgment is directed for the plaintiffs, with interest, except as to the tax on the sum of $5,741.83, which sum should be deducted from the residue passing to charity and thus added to the net estate for purposes of taxation.''

SMIETANKA, COLLECTOR v. FIRST TRUST & SAVINGS BANK, TRUSTEE

(U. S. Supreme Court, Feb. 27, 1922)
(Not yet reported)

Record: Act of October 3, 1913. On writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review a judgment which reversed a judgment of the District Court in favor of a collector of internal revenue in an action to recover back a tax paid under protest. Affirmed. See same case below, 268 Fed. 230, ante 215.

Facts: The respondent was compelled to pay a tax for the years 1913, 1914 and 1915 on the income of a trust estate which was held and accumulated for the benefit of unborn and unascertained persons.

Question: Is income held and accumulated by a trustee for the benefit of unborn and unascertained persons taxable under the Act of October 3, 1913?

Decision: "No language in the Act included a tax on income received by a trustee by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing Paragraph A the congressional intention to tax citizens everywhere, and noncitizens, resident in the United States, including persons, natural and corporate, on income from every source less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication."

"In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate. But Congress did not do so. In the next act, it did so. We cannot supply the omission in the earlier act."

(*Note:* Acts subsequent to the 1913 Act specifically declare that the income accumulated in trust for the benefit of unborn or unascertained persons shall be taxed and assessed to the trustee.)

SMIETANKA, COLLECTOR v. INDIANA STEEL COMPANY

(U. S. Supreme Court, October 24, 1921)
(Not yet reported)

Record: Act of August 5, 1909, Comp. Stat. Sec. 1635, and Comp. Stat. Sec. 1594. Suit to recover special excise taxes paid under duress. On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Facts: The taxes were collected by S. M. Fitch, then collector of internal revenue, and it was certified by the district court that there was probable cause for the act of the collector, and that the amounts recovered should be paid out of the proper appropriation from the Treasury of the United States.

Questions: (1) Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, does it state any cause of action against his successor who had no participation in the collection, receipt, or disbursement of such taxes?

(2) May suit in the district court of the United States properly be brought and maintained against a collector for the recovery of the amount of a tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection, and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?

Decision: (1) The statutes recognizing suits against collectors in such cases can not be construed to create a new statutory liability attached to the office and passing to successors. The action still is personal.

(2) The general provision in the Act of February 8, 1899, to the effect that a suit by or against an officer of the United States in his official capacity shall not abate by reason of his death, etc., but that the court may allow the same to be maintained against his successor in office, is not applicable here because the statute supposes a suit already begun against the officer in his lifetime. Whether, even if this point were waived, the provision would apply to a suit of this kind is at least doubtful.

Answer to Questions 1 and 2: No.

SMIETANKA, COLLECTOR v. ULLMAN

(U. S. Circuit Court of Appeals, Seventh Cir., July 20, 1921)
(275 Fed. 814)

Record: Bill against the defendant collector to require acceptance of Liberty Bonds at face value in payment of Federal estate tax. From a judgment of the U. S. District Court, N. D. Illinois, E. D. in favor of complainant, defendant appealed. Reversed, demurrer ordered sustained, and bill dismissed.

Facts: Complainant was executrix and sole heir under the will of her deceased husband who died May 27, 1918. On October 22, 1917, the decedent had subscribed for $20,000 of Second Liberty

Loan 4% Bonds, which were issued on November 15, 1917, and which were by him converted into Third Liberty Loan 4¼% Bonds, which, for the same aggregate amount, were issued to him on May 9, 1918, and remained in his possession until his death. The Federal estate tax upon the estate of the decedent was assessed at $18,285.57, in payment of which plaintiff tendered to the defendant as collector $18,000 of these 4¼% bonds, at par, with sufficient cash to make the total of the estate tax. Defendant refused to receive the bonds as payment on such estate tax. Section 14 of the Third Liberty Bond Act prescribes that "any bonds of the United States bearing interest at a higher rate than 4 per centum per annum * * * which have been owned by any person continuously for at least six months prior to the date of his death * * *" shall be redeemable for estate taxes. This was the only provision for receivability of these bonds for taxes to the Government.

Questions: (1) Should the time the decedent held the 4% bonds be reckoned in the holding period, in which case it would exceed the six months, thus making the bonds tendered receivable in payment of the tax in question?

(2) If Section 14 is not capable of this construction, does it work such an unwarranted discrimination against that class of holders whose death occurs during the six months period after the issue of the bonds as to render it unconstitutional?

Decision: (1) "It is very plain that, where one subscribes for and acquires bonds under the Act and dies before the expiration of six months, still holding the bonds, the definite terms of the Act would prevent their receivability in payment of a Federal estate tax. * * * But there is nothing in the situation to suggest an intention to grant to holders of the converted bonds any larger or better privilege or immunity in this respect than would be enjoyed by those who would subscribe for the third issue, and we find nothing in the wording of Section 14 from which it would follow that the time of prior holding of the 4 per cent bonds may be added to the time following their conversion into 4¼ per cents in order to fulfill the statutory requirements of six months' continuous

holding of the latter before the right of receivability for federal estate taxes arises.''

(2) ''We fail to see any merit whatever in the contention [that section 14 is unconstitutional]. The classification was reasonable and proper to be made. In this respect it treated all persons alike, for, while ''no man knoweth the day of his death,'' the uncertainty is not peculiar to any class, but is present with all persons. The six months provision would have the tendency of inducing in every one a disposition to hold at least so many of the 4¼ per cent bonds as might be deemed necessary to meet the estimated amount of a federal estate tax in case of death, and thus tend to prevent throwing the bonds on the market and depreciating their market value.''

SNYDER v. BETTMAN

(U. S. Supreme Court, June 1, 1903)
(190 U. S. 249)

Record: Act of June 13, 1898, as amended March 2, 1901. Suit to recover succession tax paid under protest. Demurrer to the petition having been overruled by the Circuit Court, and final judgment entered, the case was brought here by writ of error. Affirmed.

Facts: This was an action brought by the executor of David L. Snyder against the collector to recover $22,000, succession tax upon a legacy of $220,000, bequeathed to the city of Springfield, Ohio, in trust to expend the income in the maintenance of public parks.

Question: Is it within the power of the Federal government to impose a succession tax upon a bequest to a municipal corporation of a State for a corporate and public purpose?

Decision: ''Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or legacies of the other, since, as

repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property.''

SOUTH CAROLINA v. UNITED STATES

(U. S. Supreme Court, December 4, 1905)
(199 U. S. 437)

Record: Sections 3140, 3232, and 3244, R. S. Action to recover tax paid. Appeal from judgment for the United States in the Court of Claims. 39 Ct. Cls. 257. Judgment affirmed.

Facts: By statute, the State of South Carolina established dispensaries for the sale of intoxicating liquor and prohibited sale by other dispensers. The authorized dispensers had no interest in the sales, and received no profit therefrom. The entire profit went to the State. The license taxes prescribed by the Internal Revenue Act for dealers in liquors were paid by the state, without protest, for a number of years, and this action was subsequently brought for recovery of the amounts so paid.

Question: Are persons who are selling liquor relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors?

Decision: ''Now, if it be well established, as the authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of a private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the national government by an implied inability to impede or embarass a state in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a state engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation.''

STATE ex rel. DUHANEY v. NYGAARD

(Supreme Court of Wis., July 28, 1921)
(183 N. W. 884)

Record: Wisconsin Income Tax Act of 1917 and State Constitution Art. 8, Sec. 1, as amended in 1908. Certiorari to review proceedings of county income tax board of review. Appeal by respondent from order of circuit court setting aside an assessment of income tax. Reversed and remanded.

Facts: The plaintiff, a resident of Wisconsin, received during the income tax year in question stock dividends from a foreign corporation. The taxing authorities included these dividends in plaintiff's taxable income. This action was in accordance with the provisions of the Act of 1917 which expressly provides for the inclusion of stock dividends in taxable income. The Wisconsin Constitution provides that taxes "may also be imposed on incomes * * *."

Question: Are stock dividends paid by a corporation from earnings or profits "income" within the meaning of that term as used in the state constitution?

Decision: In the case of Soehnlein v. Soehnlein, 146 Wis. 330, this court held that, as between a life tenant and a remainderman, stock dividends were income to which the life tenant was entitled. While the rule laid down in that case is not absolutely controlling in the present case, it has an important bearing on the meaning of the words as declared by this court. The court can see no reason for giving the word a different meaning as between a taxpayer and the state, unless it had acquired such differing meaning before the constitutional amendment was adopted, and there is no indication that any such meaning had been acquired. Massachusetts and New York cases holding that stock dividends are income are cited and the rule adopted by them approved, instead of the rule to the contrary which prevails in the federal courts.

SUCCESSION OF GHEENS

(Supreme Court of La., Feb. 28, 1921)
(148 La. 1017, 88 So. 253)

Record: Louisiana Inheritance Tax Act. Proceeding to determine amount of inheritance tax. From a judgment fixing the tax an appeal is taken. Affirmed.

Facts: See Question below.

Question: Should the amount paid the federal government ($43,617.37) under the Revenue Act of September 8, 1916, Title 2, be deducted from the mass before computing the sum due the state?

Decision: The tax levied under the Revenue Act of 1916 purports to be assessed against the estate of a decedent, but in fact is only a tax upon the transfer thereof to those whom the law or the decedent has given it. If it were upon the estate itself, the same would be a direct tax and the statute would be in conflict with the federal constitution, requiring all direct taxes to be levied according to population. Whatever amount has been paid to the tax collector of the United States is a matter between it and the heirs or succession representative, and cannot be considered in fixing the amount of inheritance tax due the state.

THOME v. LYNCH, COLLECTOR

(U. S. District Court, D. Minn., Third Division, February 17, 1921)
(269 Fed. 995)

Record: Sec. 35, National Prohibition Act; Sec. 3224, R. S. On motion by plaintiffs for preliminary injunction in suits in equity. Injunction issued in all of the cases except two, which were dismissed on motion for misjoinder of plaintiffs, without prejudice to the plaintiffs to file separate bills.

Facts: The plaintiffs received from the defendant notices in writing stating that certain amounts of "taxes and penalties," etc., had been assessed against the plaintiffs, and demanding payment within ten days; that failure to make payment would be followed by further penalties of 5 per cent and interest. At the expiration of the period a second notice was received, sent from the defendant, demanding the original amount plus the penalty, 5 per cent, and

containing a statement that failure to pay would be followed by seizure and sale of property. Thirty-four separate actions were then commenced against the defendant collector, praying for injunctions restraining him from proceeding to collect the alleged taxes and penalties. All of the cases were tried together.

Questions: (1) Are the so-called taxes and penalties, which have been assessed by the Commissioner of Internal Revenue and sought to be collected by the Collector of Internal Revenue, in fact taxes within the meaning of that term as used in Section 3224 R. S.?

(2) Though not a tax within said section, is the proceeding adopted by the Commissioner and Collector nevertheless a proper method of collecting the amount claimed?

(3) Are the plaintiffs entitled to a preliminary injunction?

Decision: (1) "In view of the foregoing considerations, I have reached the conclusion that all of the exactions provided in Section 35, whether called taxes or penalties, so far as they apply to the manufacture or sale of intoxicating liquor for beverage purposes, stand on the same footing and have the same essential character. Also, and in view of the foregoing considerations, it appears more reasonable to hold that all of said exactions in Section 35, so far as they apply to the manufacture and sale of intoxicating liquor for beverage purposes, are penalties, rather than taxes. To hold these exactions to be taxes, and collectible by distraint, would, in the instant cases, be to hold that searches and seizures may be made in private residences upon suspicion, without warrant; that these plaintiffs may be compelled to give evidence against themselves as to the commission of a criminal offense; that they may be punished for alleged violation of law, without having had a day in court; that they may be deprived by administrative officers of a jury trial for an alleged criminal offense. Such results as these I do not believe were intended by Congress."

(2) "Title 2, Sec. 28, of the National Prohibition Act, confers on the Internal Revenue Commissioner and subordinate officers, for the enforcement of the National Prohibition Act, the powers which are conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors * * *. Those

powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if, as we have seen, the exactions under Section 35 of the National Prohibition Act are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that Section 28 gives no power to collect these penalties by distraint * * *. Finally, the procedure by distraint for the collection of penalties, as is now threatened in the present cases, is open to grave constitutional objections. As already noted, there has been no adjudication in court as to the liability of the plaintiff; the liability is denied; there has been no hearing. In many of the cases alleged evidence has been obtained by illegel searches and seizures. Procedure by distraint under such circumstances would not be due process of law."

(3) "If the foregoing conclusion as to the nature of the exactions be correct, then Section 3224 is not a bar to the relief sought. And for the same reasons the remedies provided in Sections 3225 and 3226, R. S. (Comp. St. Secs. 5948, 5949), have no application to the instant cases. Nor is it an adequate remedy at law for the plaintiffs to pay the exactions demanded, and sue for recovery. In some cases it is alleged that it is impossible for plaintiffs to pay the amounts demanded, sums running as high as $6,500, and that seizure and sale would ruin plaintiff's business and means of livelihood. The equities in favor of the plaintiffs are strong and persuasive."

TITLE GUARANTY & TRUST COMPANY v. EDWARDS, COLLECTOR

(U. S. District Court, S. D. New York. February 14, 1922)
(Not yet reported)

Record: Revenue Act of 1916. Action to recover a federal estate tax assessed and collected by defendant. Judgment for defendant.

Facts: The plaintiffs, as executors of the estate of Joseph W. Teets, deceased, brought this action to recover a federal estate tax assessed against the estate of the decedent and collected by the defendant, the collector of internal revenue.

Questions: (1) Is the Federal Estate Tax Act unconstitutional?

(2) Is the New York Transfer Tax deductible from the gross estate in determining the net estate subject to tax?

(3) Where a widow elects to accept a provision made in lieu of dower, must property passing under such provision be included in the gross estate of the decedent?

Decision: (1) "The recent decision of the Supreme Court in New York Trust Co. et al., as executors, v. Mark Eisner, decided May 16, 1921, expressly held that the Federal Estate Tax Act was constitutional. * * *."

(2) "These various cases can be reconciled only upon the theory that the New York Transfer Taxes are not a charge upon the estate as a whole, but upon the particular gifts by the testator. These imposts are at different rates depending on the relation of the beneficiary to the testator and in some cases where religious or charitable gifts are involved, no tax is exacted. But whatever be the nature or the incidence of the tax, the Supreme Court in the case of New York Trust Company, et al., as executor, v. Eisner, supra, has expressly passed upon the question whether it can be deducted in computing the taxable estate, and has held adversely to plaintiff's contention, and I am bound to follow this decision."

(3) "The decisions of the New York courts as to the effect of the New York Transfer Tax Act are uniform and hold that a devise or bequest in lieu of dower cannot be diminished for purposes of taxation by the value of the widow's dower right * * *. I think the argument of counsel for the defendant is sound that if the New York Transfer Tax Act, which lays the tax on the value of the property passing to the beneficiary, does not allow a deduction of her dower right, such deduction cannot be properly made under the Federal Estate Tax Act where taxation is based upon the estate which the decedent parts with. A legacy in lieu of dower after election resembles the residuary gift which becomes operative or is suggested by the refusal of a specific legatee to take. In the latter case, as was held in Matter of Wolfe, 89 A. D. 349, affirmed 179 N. Y. 599, the tax is upon the amount received by the residuary legatee after the refusal of the specific legatee to take."

UNION TRUST COMPANY v. WARDELL, COLLECTOR

(U. S. Supreme Court, May 1, 1922)
(Not yet reported)

Record: Estate Tax Act of September 8, 1916. In error to U. S. District Court, N. D. California, to review a judgment which dismissed the complaint in a suit against the collector of internal revenue to recover back the federal estate tax as having been unlawfully collected. 273 Fed. 733, ante 517. Reversed and remanded for further proceedings.

Facts: On May 31, 1901, the decedent, by trustee, assigned certain securities to her son, as trustee, to pay the income therefrom to the decedent during her life time, and after her death, to distribute the securities to certain relatives. The decedent died on November 14, 1916. The will was duly probated and the tax under the Act of September 8, 1916, was paid on the property which passed under her will but no tax was paid on the 4,985 shares transferred 15 years before by the trust deed. The Commissioner, having ruled that those shares were subject to a tax, assessed against them the sum of $4,545.50. It was paid under protest and this action brought for its recovery.

Questions: (1) Was the Act of September 8, 1916, retroactive, so as to apply to a transfer intended to take effect in possession or enjoyment at or after death, where the transfer was made prior to the passage of the Act?

(2) Was the lower court correct in bringing into the case, on motion of the plaintiff, the successor to the collector of Internal Revenue who had collected the taxes sought to be recovered?

Decision: (1) "The same contentions are made against and for the ruling of the court as were made in Shwab v. Doyle. It is not necessary to repeat them. They are, with but verbal variations, the same as in Shwab v. Doyle, and the Commissioner so considering, submits this case upon his brief in that. We have there stated them and pass judgment upon that which we think determines the case, that is, the retroactivity of the Act of September 8, 1916. The facts in this case fortify the reasoning in that. In this

case the Act is given operation against an instrument executed 15 years before the passage of the act."

(2) The Collector of Internal Revenue who had no part in the collection or disbursement of a tax assessed and collected by his predecessor in office may not be brought in as a party to a suit begun while the latter was still in office to recover back the amount of the tax as having been unlawfully collected.

UNITED STATES v. GUINZBURG

(U. S. Circuit Court of Appeals, Second Cir., Dec. 14, 1921)
(278 Fed. 363)

Record: Act of October 3, 1913. Action by the United States to recover amount of income tax alleged to be due. Judgment for defendant in District Court and the United States brings error. Affirmed.

Facts: On February 17, 1913, the I. B. Kleinert Rubber Company declared a dividend of 18 per cent to common stockholders of record on January 30, 1913. This dividend was payable July 1, 1913. The dividend was declared out of profits of the company earned during the year 1912. Guinzburg was a stockholder in the company on January 30, 1913, and received a dividend, amounting to $70,380, which he did not include in his return for 1913. The Act of 1913 provided that for the year ending December 31, 1913, the tax should be computed on the net income accruing from March 1 to December 31, of that year.

Question: Did the dividend in question accrue to the taxpayer before March 1, 1913, so as to be taxable under the Act of 1913?

Decision: "We conclude that, upon the declaration of a dividend, the debt was immediately created in favor of the defendant in error, payable at a future date. By that action a vested right was created in favor of the stockholder, who could sell his right by assigning or pledging or otherwise disposing of it, and this was not income arising and accruing within the meaning of the statute, such as might be taxed under the Income Tax Act of March 1, 1913, here in question." We find no error below, and the direction of a judgment for the defendant is affirmed.

UNITED STATES v. MELLON

(U. S. Circuit Court of Appeals, Third Cir., March Term, 1922)
(281 Fed. 645)

Record: Act of October 3, 1913. Action by United States against William Larimer Mellon to recover amount of income tax alleged to be due. In the District Court a jury was waived and the case tried by the judge, who found a verdict for defendant. Thereupon the United States sued out this writ of error. Judgment affirmed. For case below, see 279 Fed. 910, ante 551.

Facts: The defendant was the owner of shares of stock of the Gulf Oil Corporation. While the earnings of this company had been large it had never declared a dividend, its earnings having been used in development and extensions. The company was heavily in debt, its loans being carried on the credit and endorsement of some of its large stockholders. At the close of the year 1912, the company was without sufficient working capital and its affairs called for refinancing. The capital stock of the company at this time was $11,208,200, its indebtedness $15,000,000, and against this indebtedness it had quick assets of $12,500,000. To meet this situation, the following plan was carried out. The capital stock was increased to $60,000,000, and it was determined that $11,280,200 of this stock was to be sold at par to present stockholders for cash. To induce the stockholders to buy this stock, every purchaser was to receive, in addition to the stock which he bought at par, 100% of extra stock. In order to insure the success of this plan, all of the directors of the company, including the defendant, all of whom were large stockholders, agreed in advance to so accept and pay for their proportionate amount of stock; and at the same time A. W. Mellon and R. B. Mellon, who were large stockholders, who had endorsed the outstanding paper of the company in procuring its credit, agreed that, in case any stockholders should decline to take their proportionate amount in stock, they would take and pay to the corporation par for all shares that might be declined. Any stockholder outside of the persons just named, who declined to subscribe for stock, would thus receive in cash the par value of the bonus stock which he would otherwise have received as a bonus for his

subscription. The court found that without this understanding the dividend of 100% could not and would not have been declared and also that, at the time of the declaration and payment of the dividend, the corporation did not have cash with which to pay the same or any substantial part thereof.

Question: Did the stock received by the defendant under the circumstances stated above constitute taxable income to him?

Decision: "From all of this, it is quite evident that all of the acts of the company, whether called issues of stock or declarations of dividends, were in fact and reality a re-financing of the corporation, in which this defendant and other large stockholders bound themselves to pay, and in fact did pay, into the company's treasury, the additional capital which it required. Their position was not that of having an option to take stock or to take money, but it was an obligation to take stock for which they agreed to pay. The common understanding of 'income' is something coming to a man, and is not aptly described by a transaction where he is forced to pay and does pay money to a company which did not, and was not able to, pay dividends, and which therefore was not able to increase his income.

"We are of opinion the court below was justified under the facts in finding the defendant received no income from the Gulf Oil Company and was therefore not liable to the Government to pay the alleged income tax for which this suit was brought."

UNITED STATES v. PERKINS

(U. S. Supreme Court, May 25, 1896)
(163 U. S. 625)

Record: New York Inheritance Tax Act. Writ of error to an order of the Supreme Court of the State of New York. Affirmed.
Facts: One Merriam died on January 30, 1889, leaving a will by which he devised and bequeathed all of his property to the United States Government. The Surrogate fixed a tax of $3,964.23 upon personal property passing to the United States under the terms of the will. On appeal this order was affirmed by the Supreme Court and the Court of Appeals of New York.

Question: Is it within the power of the state to tax bequests to the United States?

Decision: After a discussion of numerous cases holding that an inheritance tax is not a tax upon the property itself, but upon its transmission by will or by descent, the court concluded that: "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

UNITED STATES v. PHELLIS

(U. S. Supreme Court, Nov. 21, 1921)
(Not yet reported)

Record: Act of October 3, 1913. Appeal from Court of Claims to review a judgment which sustained a claim for a refund of certain moneys paid under protest as an additional income tax. Reversed and remanded, with directions to dismiss the suit. For case below see ante p. 404.

Facts: In 1915, E. I. du Pont de Nemours & Company was organized as a corporation to take over all the assets and good will of E. I. du Pont de Nemours Powder Company, a New Jersey corporation, which had a large surplus of accumulated profits. This transfer was carried out by appropriate corporate action, the old company receiving as consideration therefor debenture stock of the new company and also two shares of common stock of the new company for each share of its own outstanding capital stock. Each stockholder of the old company retained his old stock and besides received a dividend of two shares of stock of the new company.

The personnel of the stockholders and officers of the two companies was, at the time of the transfer, identical, and the holders of common stock in both corporations had the same proportionate interest in each. After the reorganization the old corporation continued as a going concern but, except for the redemption of its

outstanding bonds, exchange of debenture stock for its preferred stock, the holding of debenture stock to an amount equivalent to its own outstanding common, and collection and disposition of dividends thereon, did not engage in any business.

The fair market value of the stock of the New Jersey corporation just prior to the reorganization was $795 per share, and afterwards it was $100 per share. The fair market value of the stock of the Delaware corporation, distributed, as aforesaid was $347.50 per share. The Commissioner of Internal Revenue held that the shares of the Delaware company's stock acquired by the claimant was income of the value of $347.50 per share, and assessed an additional tax accordingly.

Question: Were the shares of stock in the new company received by the claimant as a dividend by reason of his ownership of stock in the old company a gain derived from capital, as distinguished from a gain accruing to capital, and hence taxable?

Decision: When the common stock of the new company was distributed among the stockholders of the old company as a dividend, then at once—unless the two companies must be regarded as substantially identical—the individual stockholders of the old company, including claimant, received assets of exchangeable and actual value severed from their capital interest in the old company, proceeding from it as the result of a dividend of former corporate profits, and drawn by them severally for their individual and separate use and benefit. Such a gain, resulting from their ownership of stock in the old company, and proceeding from it, constituted individual income in the proper sense.

"That a comparison of the market value of claimant's shares in the New Jersey corporation immediately before, with the aggregate market value of those shares, plus the dividend shares, immediately after the dividend, showed no change in the aggregate,—a fact relied upon by the court of claims as demonstrating that claimant neither gained nor lost pecuniarily in the transaction,—seems to us a circumstance of no particular importance in the present inquiry. * * * That the distribution reduces the intrinsic capital value of the shares by an equal amount is a normal and necessary

effect of all dividend distributions, whether large or small, and whether paid in money or in other divisible assets; but such reduction constitutes the dividend none the less income derived by the stockholder if it represents gains previously acquired by the corporation.''

The Delaware company could not be treated as identical with the New Jersey company because it was a new corporation, organized under the laws of a different state, and was to have an authorized capital stock of almost four times the aggregate stock issues and funded debt of the New Jersey company, of which less than one-half was to be issued to the old company, leaving the future disposition of a majority of the authorized new issues still to be determined.

''But, further, it would be erroneous, we think, to test the question whether an individual stockholder derived income in the true and substantial sense through receiving a part in the distribution of the new shares, by regarding alone the general effect of the reorganization upon the aggregate body of stockholders. The liability of a stockholder to pay an individual income tax must be tested by the effect of the transaction upon the individual * * *. The new common stock became treasury assets of the old company, and was capable of distribution as the manufacturing assets whose place it took were not. Its distribution transferred to the several stockholders new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers.'' Whether the stockholder ''sold the new stock for money or retained it in preference, in either case when he received it, he received as his separate property a part of the accumulated profits of the old company in which previously he had only a potential and contingent interest.''

''It thus appears that, in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital, but in distribution of accumulated profits of the

company,—something of exchangeable value produced by and proceeding from his investment therein, severed from it, and drawn by him for his separate use. Hence it constituted individual income within the meaning of the Income Tax Law, as clearly as was the case in Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152, 38 Sup. Ct. Rep. 546."

UNITED STATES v. RACHMIL, et al.

(U. S. District Court, S. D. New York, Jan. 29, 1921)

(270 Fed. 869)

Record: Penal Code, Section 37; Revenue Act of 1918. Indictment for attempting to evade income tax. Motion to quash granted.

Facts: The defendant Bloom was previously brought to trial, and acquitted, upon an indictment which, in one count thereof charged him and his co-defendants, Rachmil, Samuelson, and Rosenblum, with having conspired to defraud the United States; another count of the indictment charged as against the persons named a conspiracy to commit an offense against the United States, to-wit, an attempt willfully to deceive and evade the income tax imposed by the Revenue Act of 1918. In the original indictment the overt acts set up were as follows: (1) That Rachmil and Samuelson prepared a fraudulent income tax return for Bloom; (2) that Bloom signed the alleged fraudulent, false, and incorrect income tax return; (3) that Rachmil signed the said return and acknowledged the signature of the defendant Bloom thereto; and (4) that the defendant Bloom filed and caused to be filed with the Collector of Internal Revenue for the Third District of New York the said false, fraudulent, and incorrect income tax return. Having successfully withstood the former prosecution, the defendants Rachmil, Samuelson and Bloom again find themselves under indictment charged with having knowingly, willfully, and unlawfully attempted to defeat and evade certain provisions of the aforesaid taxing statute. The defendant Bloom pleads in bar, first, that he has already been subjected to a trial of the offense charged in the present indictment; and, second, that all the issues of fact which would arise under a plea of not guilty to said indictment were presented upon the trial

under the first indictment, and that said issues having been then adjudicated cannot again be the subject of a further prosecution. Accompanying the plea in bar was a motion to quash.

Questions: (1) Could the overt act charged in the previous indictment amount to an attempt to evade the tax under the present indictment?

(2) Would the preparation of a false return, without the filing thereof, constitute an attempt to evade a tax?

(3) Was the issue here involved litigated in the previous trial?

Decision: (1) "It is impossible to tell, upon the general verdict of not guilty rendered by the jury before which Bloom was tried, whether there was a failure of proof as to the existence of the conspiracy, or the commission of the overt acts set up or both. It is, however, none the less the fact that a conspiracy to commit an offense, and an act done in pursuance and to effectuate the object thereof, may easily, if it does not necessarily, comprehend an attempt to commit the crime as to which the conspiracy relates."

(2) "Were it not for the overt act last recited, I would decline to give further consideration to the motion to quash. In other words, the first three overt acts fall short of an attempt to violate the taxing statute. The parties might have conspired to violate the law, and have done things in pursuance of such conspiracy which in and of themselves could by no manner of means constitute an attempt to violate the law * * *. When, however, a step which has for its purpose nothing less than an attempt to defeat the Income Tax Law has taken place, namely, the filing of the return with the collector of internal revenue, the act denounced by the Income Tax Law itself has occurred. I say this because the return is then placed beyond the control of the defendant, and the collector in usual course will use such return as a basis of assessing the tax. The attempt of the defendant, if the return be false and fraudulent, is complete."

(3) "Upon a trial of the present indictment, the issue as to whether the return filed was false and fraudulent, would be a fundamental proposition. That issue was involved in the previous trial, and to permit it to be litigated again would come so close to

an encroachment upon the constitutional rights of the defendants as to warrant me to quash the present indictment.''

UNITED STATES v. SAN JUAN COUNTY et al.

(U. S. District Court, W. D. Washington, N. D., January 19, 1922)
(280 Fed. 120)

Record: Revenue Act of 1917 and Section 3466 Rev. Stat. Action to recover income tax and penalties for the year 1917. Judgment for plaintiff.

Facts: The San Juan Canning Co., an insolvent corporation, was indebted to the United States by reason of income tax and penalties for the year 1917. On the 28th of May, 1921, after demand and refusal to pay, a warrant of distraint was levied upon the personal property of the Canning Company, located in San Juan County, and sale advertised for June 15, 1921. Thereafter, the sheriff of San Juan County levied upon the property to collect state and county taxes for the years 1918, 1919, and 1920, and advertised the property for sale June 10, 1921. On application of plaintiff the restraining order was issued and served upon the sheriff. The plaintiff claimed that under Section 3466 R. S. the United States had priority. The county contended the contrary.

Question: Was the claim of the United States or that of the County entitled to priority as to the property of the insolvent corporation?

Decision: The power of taxation is an indispensable incident to sovereignty and by the provisions of its constitution and laws, a grant in favor of the United States is paramount in the event of the insolvency of the debtor. Neither the State or County are judgment creditors, mortgagees or purchasers, and hence they are not affected by the provisions of section 3186 R. S. Therefore, under the provisions of Section 3466 R. S. the United States is entitled to a decree.

UNITED STATES v. VARIOUS DOCUMENTS, etc.

(U. S. Circuit Court of Appeals, 7th Cir., Dec. 14, 1921)
(278 Fed. 944)

Record: Proceeding by the United States against various documents, papers and books, taken on search warrants and claimed by Briggs & Turivas. United States brings error to review an order of the United States Commissioner. Dismissed.

Facts: Commissioner Mason of Chicago, on the affidavit and oral testimony of a revenue agent, issued a search warrant on which the Marshal seized various documents, papers, and books belonging to Briggs & Turivas, Inc. Thereupon, Briggs & Turivas appeared before the Commissioner and filed a petition to have the search warrant quashed and the property returned. To this petition the district attorney filed an answer; and the Commissioner, after hearing the evidence and arguments of counsel, entered an order for judgment in accordance with the prayer of the petition.

Questions: Briggs & Turvias insist that the writ of error be dismissed because: (1) This court has no appellate jurisdiction over the order or judgment of the Commissioner; (2) the proceeding was based upon the alleged commission of a felony, and the case was therefore of a kind in which the Government has no right of review; and (3) the order was interlocutory.

Decision: "In support of the correctness of the Commissioner's action Briggs & Turivas contend: (1) No facts were presented which showed either direct or inferentially any probable cause for believing that a felony had been committed; (2) nor that the seized property was the means of committing any felony; and (3) the search warrant contained no particular description of the property to be seized and was therefore only the general warrant against which the Fourth Amendment was aimed." * * *

"Inasmuch as the record bears out the contentions in support of the correctness of the Commissioner's action, there is no merit in the government's writ of error. But we have no judgment of a District Court before us to affirm, and we therefore dismiss the writ on the first ground, leaving the other grounds for dismissal untouched."

UNITED STATES v. WADDELL INVESTMENT CO.

(U. S. District Court W. D. Missouri, W. D. Jan. 26, 1921)
(275 Fed. 934)

Record: Act of August 5, 1909. Action by the United States to recover taxes. Judgment for plaintiff.

Facts: The defendant was organized as what is known as a loan and investment company. Under its charter, originally it loaned money, taking back mortgages upon farms and other real estate, which said mortgages together with the notes secured thereby, it sold to its clients desiring investments. Subsequently, however, it made a change in the form and procedure of such transactions, and issued and sold its own so-called first mortgage certificates of convenient denominations and placed behind these, as security, with a trustee, the notes secured by mortgage which it had previously acquired and which, in its former course of business, it had been its practice to sell. In practice, as well as in substance, it received through the trustee the interest upon its securities placed with the trustee, and paid out from such sources, and from its other sources of revenue, the interest accruing upon its first mortgage certificates sold by it to investors. Substantially, the difference between such aggregates of interest, plus sums accruing from commissions, constitutes its net income or profits.

Questions: (1) Was the plaintiff entitled to deduct from the net income shown on its return the amount of interest received upon its mortgages on the theory that it went directly to pay the interest on its first mortgage certificates?

(2) Would this action lie without assessment having previously been made?

Decision: (1) "It is sufficient to say that there is no identity between such payments and formal identity could not affect the issue. The mortgage interest comes into its assets, and the interest upon certificates is paid out generally from such assets. The allowance of this claim would have the effect, in substance, of permitting the defendant company to deduct from the gross amount of its income interest paid on its bonded or other indebtedness to an amount

exceeding its paid-up capital stock. Aside from all this, the income from such sources is income of the defendant corporation and should be considered and treated as such for the purposes of this excise tax.''

(2) ''Where a tax of a fixed percentage [like the one imposed by Excise Law of 1909 on corporations] is so definitely described in the statute that its amount or value * * * can be ascertained and determined, on evidence, by a court, a suit [therefor] will lie, without an assessment.''

VAUGHAN et al., EXECUTORS v. RIORDAN, COLLECTOR

(U. S. District Court, W. D. of N. Y., Oct. 15, 1921)
(280 Fed. 742)

Record: Revenue Acts of 1916 and 1917. Suit by executors to recover federal estate taxes alleged to have been illegally collected. Judgment for plaintiff.

Facts: The decedent made a gift of bonds of the value of $273,649.17 to his wife nine days before his death. The total value of decedent's estate, including the bonds, approximated $2,500,000. The decedent died at the age of 71 years. The bonds transferred to the wife were not included in the estate tax return. There was an overpayment of $9,294.12 on this return, arising from a deduction or allowance of a testamentary gift to a library. The Commissioner retained this overpayment applying it on the tax which he claimed the estate owed for the gift of the bonds to the wife. The executors protested and the additional balance required by the Commissioner was paid and this action brought for refund of the amount assessed on the bonds. Had the bonds been included in the tax return the estate tax would have been larger by the amount of $38,310.89.

Questions: Was the gift in question ''made in contemplation of death'' within the meaning of the statute and so to be included as part of the gross estate.

(2) If the bonds were transferred to the wife so that she received the income therefrom for household expenses and to relieve the decedent of the burden of paying them and of including them

in his income tax returns, does this fact make the transfer taxable as part of his estate on the theory that it was to take effect after the donor's death?

(3) Is the amount of $9,294.12, which had admittedly been erroneously paid by the plaintiff, barred in this action since it was not originally paid under protest?

Decision: (1) The court found that, while the decedent had been afflicted with diabetes for twenty years prior to the time of his death, his general health was regarded as good at the time the gift was made. Two days after the gift was made he was seized with a throat infection, which could not have been anticipated, which aggravated his diabetic condition and brought on his death. Furthermore, the wife testified that her husband had long intended giving her the securities inasmuch as he had been giving her income from them as a monthly allowance. He had stated at various times that he intended transferring them to her. Similar statements had been made to his bookkeeper, who under his orders had prepared a list of the bonds to be transferred. The court, therefore, found that there was no substantial evidence that the transfer was in contemplation of death but that in fact it was given in good faith and at a time when the decedent had no expectation or anticipation of death in either the immediate or distant future.

(2) As to the contention of the Government that the gift was one to take effect after the donor's death, the court held that this contention was based upon the theory that the decedent maintained the household and the securities were to be used to pay his own indebtedness. The court concluded on this point, however, that the gift was not in the nature of a reservation of income from the bonds to his own uses since the gift was absolute, unaccompanied by any conditions or reservations. The wife testified that there was no understanding that the income from the bonds should be used in any particular way.

(3) As to the third contention of the Government, the law clearly is that unless the tax is paid under duress or compulsion and under protest made at the time of payment there can be no recovery, but in this case, the amount erroneously paid, as shown in the origi-

nal return, was not a voluntary payment of the tax on the bonds. The deputy commissioner's review and audit shows the amount to have been a reduction from the estate tax payment and it is not understood by what right he applied it to payment of taxes on bonds not specified in the original return. His disposition in this relation was unauthorized, arbitrary and coercive. "It may be that if the Government had not made a reduction on account of the bequest to the library at Geneseo, the payment by plaintiffs under their original return without demand, would be held a voluntary payment and recovery barred, but the amount retained and irregularly applied without the consent of the plaintiffs and under their protest when they paid the tax exacted does not come under the principle of the adjudication cited in defendant's brief."

"The plaintiff in my opinion is entitled to judgment against the United States Internal Revenue Collector for a return of the tax illegally assessed on the bonds in question and paid by the plaintiffs under protest."

WARDELL, COLLECTOR v. BLUM et al.

(U. S. Circuit Court of Appeals, Ninth Cir., Oct. 24, 1921)
(276 Fed. 226)

Record: Revenue Act of 1916. Action at law to recover the amount of a federal estate tax paid under protest. In error to the District Court which entered a judgment overruling demurrer to complaint. For same case below see 270 Fed. 309, ante 97. Affirmed.

Facts: This suit was brought for the recovery of an estate tax paid to the Government under protest on the half-interest of the wife of the decedent Blum in the community property which passed to her under the laws of the State of California upon the death of her husband.

Question: Was the half of the community property which passed to the wife upon the death of the decedent part of the net estate of the decedent and so subject to the federal estate tax?

Decision: The court points out that in the case entitled In re Moffitt's Estate, 153 Cal. 359, the Supreme Court of California held that the share of the surviving wife in the community property was

subject to the inheritance tax imposed by the statute of the state, citing a number of decisions to the effect that upon the death of her husband the wife took one-half of the community property only as "heir" of her husband. However, in 1917 (Stat. 1917, p. 880) the California legislature so changed its inheritance tax law as to expressly declare that for the purposes of the act the half of the community property which goes to the widow on the death of the husband, shall "not" be deemed to pass to her as "heir" of her husband, but, shall go to her as and for a valuable and adequate consideration, and shall not be subject to the inheritance law of the state.

The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent "to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." Such interest must be determined by the law of the state where the property is situate. "In the present instance the law of that state is declared by the statute enacted in 1917, providing that so far as state inheritance taxes are concerned, the wife of a decedent acquired upon his death one-half of the community property in her own right, and not as heir of her husband; in effect, therefore, that insofar as state inheritance taxes are concerned, the estate of a decedent has no interest of any sort in the wife's half of the community property. That, in our opinion, settles the question here presented against the contention of the government; for we not only see nothing in the above quoted provision of the United States statute to indicate any intention to impose a federal inheritance tax upon the wife's half of community property which the statute of the state where the property is situate expressly declares passes to the wife upon the death of her husband in her own right and not as his heir, but the federal statute, as will be seen, expressly declares as one of the essential conditions to the imposition of a federal inheritance tax that the net estate of the decedent shall be 'subject to distribution as *his* estate.' "

Even if the case were not controlled by the California statute of 1917, applying to it the rule of law announced by the Supreme

Court of the United States in the case of Arndt v. Reade, 220 U. S. 311, 320, to the effect that the wife has a greater interest in community property than the mere possibility of an expectant heir, the result would be the same, since under that rule one-half of the community property would go to the surviving wife, the other half being subject to the testamentary disposition of the husband by virtue of Section 1402 of the Civil Code of California.

Hunt, Circuit Judge, dissenting.

WASSEL v. LEDERER, COLLECTOR

(U. S. District Court, E. D. Penn., July 19, 1921)
(274 Fed. 489)

Record: National Prohibition Act and R. S. Sec. 3224. In equity. Suit to restrain the levy of a tax under section 35 of the National Prohibition Act. On motion to discuss bill. Motion granted.

Facts: "The purpose of the bill is stated and the real cause of action implied by the averment of paragraph 3: 'That this suit is instituted to prevent' the 'collector of internal revenue from collecting and attempting to collect from the plaintiff internal revenue tax levied under and by virtue of the act of Congress of October 28, 1919.' "

Question: Granting that the court has no power to restrain collection of a tax, because of the provisions of R. S. 3224, will a Federal trial court make a finding that an exaction called by Congress a tax is in fact a penalty, the enforcement of which may be enjoined under appropriate circumstances?

Decision: "Congress has called the payment imposed a tax, and has directed it to be levied and collected as such. It is, as we view it, beyond the province of a trial court to make the finding that Congress is not exercising the power which it declares itself to be exercising, but another power which it does not lawfully possess. * * * The view we take, however, is that it is the orderly and preferred mode of judicial procedure to leave to a court of final jurisdiction the duty and responsibility of finding the fact upon which the distinction made rests."

"We accordingly refuse to make the finding that the tax imposed is not a tax, and this carries the consequence that the bill of complaint be dismissed."

WEAVER, COLLECTOR v. EWERS

(Circuit Court of Appeals, Eighth Cir., Feb. 29, 1912)
(195 Fed. 247)

Record: R. S. Sec. 3226. Action to recover tax paid under protest. Judgment for plaintiff (182 Fed. 173), and defendant brings error. Affirmed.

Facts: The tax in question, together with a penalty, was assessed against the plaintiff as a wholesale dealer in oleomargarine. After the assessment of the same the plaintiff filed with the Commissioner an application for review and abatement. Subsequently the Commissioner overruled the application and refused to abate the tax. The plaintiff then paid the assessment under protest and brought this suit.

Question: Does R. S. Sec. 3226 require a taxpayer, who has paid a tax under protest and after claim for abatement of same has been filed and disallowed by the Commissioner, to make a further appeal to the Commissioner before he is entitled to institute suit for recovery of the tax?

Decision: "Notwithstanding, however, the provision of section 3226 above mentioned, that no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, until an appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein, we are of the opinion that, as the law does not require idle acts, the first ground of demurrer must be overruled, as the purpose and requirement of the statute above quoted has been fully met by the application for review of the assessment made to the Commissioner of Internal

Revenue as set out in the petition. What the Commissioner of Internal Revenue thought about the assessment had been obtained upon full statement of the facts, and it would have been a useless form again, after the tax was paid, to appeal to the Commissioner and obtain the same judgment. The reason for the appeal did not exist, and hence the appeal after tax was paid was not necessary."

THE WESTERN UNION TELEGRAPH COMPANY v. THE DELAWARE, LACKAWANA, etc., RAILROAD COMPANY

(U. S. District Court, S. D. of N. Y., June 5, 1922)
(Not yet reported)

Record: Revenue Act of 1918. Action by Western Union Telegraph Company to recover $4,530.70 which it paid to the Government as a tax upon 50,098 messages transmitted by it for the defendant railroad company under a certain contract. Judgment for the plaintiff.

Facts: This was a friendly suit brought by the respective parties to test the validity of Article 9 of Regulations 57 promulgated under the provisions of Section 500 (f) and 501 (a) (c) of the Revenue Act of 1918. On July 1, 1905, the telegraph company and the railroad company entered into a contract for the mutual exchange of services free of charge in the transmission of telegraph messages. Under the provisions of Article 9 of Regulations 57, such messages were subject to the tax imposed by Section 500 (f) of the Act, computed upon the amount of the regular established charge for the transmission of similar messages for ordinary customers, calculated at the regular fixed rate provided in the tariff of the transmitting carrier. The tax on these messages was paid by the Western Union Company to the Government and this suit instituted against the defendant on its contract to recover the amount thereof. The Government was informed of the suit but the Commissioner of Internal Revenue considered it inadvisable to take any part in this litigation until expressly requested by the court to file a brief as amicus curiae.

Questions: (1) Can the validity of the regulations, and hence of the tax, be questioned in a collateral proceeding of this character?

(2) Were the regulations promulgated by the Commissioner under which the tax was computed upon the amount of the regularly established charge for the messages justified by the statute?

Decision: (1) The court first points out that if the telegraph company had refused to send the messages before receiving the tax or an agreement of indemnity of some sort, and the railroad company had then sought to enjoin the attempted collection of the tax by the telegraph company it probably could have succeeded in having the legality of the tax tested in advance on the authority of Pollock v. Farmers Loan and Trust Co., 157 U. S. 429; Brushaber v. Union Pacific R. R. Co., 240 U. S. 1; Hill v. Wallace, U. S. Supreme Court, May 15, 1922, notwithstanding the provisions of Sec. 3222 R. S. "But the usual channels provided by Congress for testing the legality of taxing measures are normally exclusive, and recourse is not to be had to other channels, unless necessary to prevent irreparable injury and great confusion. No such emergency exists in the instant case." No good reason exists why a refund should not be sought and, if refused, a suit instituted.

"If as a practical matter the telegraph company was obliged under color of law to pay the alleged tax, and no steps to enjoin such collection were taken by the railroad company or the telegraph company, it would seem that the burden of the payment and of the contest of the legality of the tax, if there is to be any, ought to fall upon the party who under the Act was supposed to pay the tax. * * * It seems to me that in the circumstances of the instant case the railroad company had no more right to question this payment made for its account by the telegraph company under color of law than a principal would have to question a payment reasonably and in good faith made by his agent in the course of his duties. * * * The tax was paid under color of law and should in consequence as between the parties be borne by the railroad company. The parties can not by their own agreement change the method provided by Congress for testing the validity of tax legislation."

"It is unnecessary to expand upon the unwisdom and impolicy of passing upon the legality of important taxing measures in a collateral proceeding of this character, to which the Government is

not a party and of which, because of the possible collateral issues involved, the Treasury may have as was apparent by the case here before the court intervened, an insufficient understanding. In the Pollock, Brushaber, and Hill cases, the tax had not been collected, and to prevent great confusion and irreparable damage the Court entertained jurisdiction; the instant case, as we have seen, presents no such necessity for preventitive justice.''

(2) ''But if I should err in my judgment that it is unnecessary for me to consider in this suit whether or not it was within the lawful authority of the Commissioner of Internal Revenue by regulation to apply the tax provided in Section 500 (f) of the Revenue Act of 1918, to contracts for the exchange of services, I should not hesitate to uphold the regulation in the absence of evidence of its unreasonableness. * * * The Revenue Act provides that the taxes shall apply to all services rendered for hire. Giving reasonable scope to the legislative intent, the Act, in my judgment, must be construed to cover all messages transmitted for an economic consideration,—money or money's worth. It is difficult under a sound taxing policy to find a basis for differentiation between exchanges and cash-paid services. * * * True, there might be some difficulty in working out the valuation to be placed upon messages transmitted under exchange of service agreements, but the administration of the Act is vested in the Commissioner of Internal Revenue, who is empowered to issue regulations necessary and proper to carry into effect the general provisions of the law. * * * In cases of this kind, administrative rulings made by the Department after careful consideration of the problem as it affects the country as a whole ought not lightly to be disturbed by the Court.''

IN RE WILLIAMS OIL CORPORATION

(U. S. District Court, W. D. Kentucky, April 24, 1920)
(265 Fed. 401)

Record: Section 64a, Bankruptcy Act. On petition for review of ruling of referee. Ruling reversed, with directions.

Facts: The adjudication in bankruptcy was made on December 19, 1919. On January 14, 1920, the Collector of Internal Reve-

nue filed proof of claim of the United States for income taxes alleged to be due from the bankrupt. This claim was allowed. On January 20, 1920, the trustee in bankruptcy filed a petition praying for a re-examination of the claim thus presented by the United States. On February 4, 1920, the Collector of Internal Revenue moved to dismiss the trustee's petition for re-examination. On March 19, 1920, the referee sustained that motion, and this petition, asking a review of that order, was thereupon filed in due course.

Questions: (1) May a trustee in bankruptcy resist a tax claimed to be due by the United States, and have the accuracy or justice of the claim therefor determined by the bankruptcy court instead of paying the tax and filing claim for refund?

(2) Would regulations made by the Commissioner of Internal Revenue have the effect of nullifying the statute authorizing the bankruptcy court to determine questions as to the amount of legality of any tax due and owing by the bankrupt?

Decision: (1) "It seems to the court to be entirely obvious that it was the purpose of Section 64a to have such matters as are therein referred to settled promptly in the bankruptcy proceeding itself. * * * The referee concluded that the bankruptcy court had no jurisdiction to do this. We think this conclusion of the referee was erroneous, and the order sought to be reviewed will therefore be reversed, with directions to re-examine the claim on behalf of the United States, and ascertain the correct amount due thereon. Of course it is obvious that this opinion in no way passes upon any question of law or of fact that may be raised in the further proceedings in this court, either before the referee or here. All we decide is that under Section 64a the court has the power, and it is its duty to examine into any question which may arise as to the amount or legality of the taxation claimed—that being precisely what Section 64a authorizes the bankruptcy court to do."

(2) "It is altogether true that the Revenue Act does, and properly does, authorize generally the making of regulations by the Commissioner; but the Commissioner is not given authority by a regulation to nullify or in any way to interfere with statutory provisions respecting other matters, such as Section 64a."

Pages 1013 to 1087 have been omitted in this fourth edition printed November, 1924, because they have been superseded by a Revised Table of Cases and Revised Index printed in the Second Supplement off the press December, 1924.

The Revised Table of Cases and Revised Index cover three volumes of United States Tax Cases.